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WASHINGTON REPORTS

VOL. 70

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

AUGUST 26, 1912—NOVEMBER 4, 1912

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REPORTER

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ERRATA

Page 347, 1st syllabus, line 3 from top, for and read an
Page 540, 1st syllabus, line 3 from top, for § 5736 read § 8736
Page 545, line 5 from bottom, for § 23 read § 3

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 10297. Department Two. August 26, 1912.]

STANLEY W. SMITH, *Appellant*, v. J. F. BOLSTER, *Respondent*.[1]

SALES—REPRESENTATIONS—WARRANTY—OPINIONS. Upon the sale of an automobile that had been run 1,500 miles as a demonstrator, on account of which the price was over twenty-one per cent less than the price of a new car, representations that it was "in first class condition, as good as any new car," and that it would "go eleven miles to a gallon of gasoline on an average," are mere "seller's praise" and do not constitute a warranty.

Appeal from a judgment of the superior court for Spokane county, Hinkle J., entered January 4, 1912, upon findings in favor of the defendant, in an action on contract. Reversed.

Bruce Blake, for appellant.

John C. Kleber, for respondent.

MORRIS, J.—Action to recover $900 balance due on the purchase of an automobile, and $39.05 balance due on an open account. Respondent resisted recovery upon the ground that the car was not in the condition represented at the time of the purchase, and that there was a further breach in that it would not run eleven miles on a gallon of gasoline, as guaranteed by appellant. The court below found that

[1]Reported in 125 Pac. 1022.

the car was not in as good condition as represented by appellant, and because thereof respondent was damaged to the extent of $250. It was also found that the car would not run eleven miles on a gallon of gasoline, and because of this failure respondent was awarded $250 as damages. The court then gave appellant judgment for $400, as due on the purchase price after deducting the awards of damage, together with the amount claimed on the open account; and alleging error in the findings awarding respondent damages, appellant brings the case here.

Previous to the sale, the car had been used by appellant as a demonstrating car, and had been run about fifteen hundred miles. These facts were known to respondent. On account of them, the car was priced at $1,800, a reduction of $500 from the price of the car had it been new. The warranty is predicated upon the statement of appellant, that the car was "in first class condition, as good as any new car," and that appellant "guaranteed the car to go eleven miles to a gallon of gasoline on an average." These statements, in our opinion, do not constitute a warranty. The fact that the price was fixed at over twenty-one per cent less than the price of a new car was of itself evidence that the car was to that extent of less value than a new car. To say that it was in first-class condition is nothing more than the expression of an opinion as to its then condition, or what the law sometimes terms "seller's praise." The same may be said of the statement that it would run eleven miles on a gallon of gasoline.

Morley v. Consolidated Mfg. Co., 196 Mass. 257, 81 N. E. 993, is a similar case. The car there referred to was a demonstrating car that had run about five hundred miles, and the statement relied upon was that the car "was in good condition, first class condition." It was held not to constitute a warranty, being "mere seller's talk." Similar expressions may be found in 28 Cyc. 44; *Warren v. Walter Auto Co.*, 99 N. Y. Supp. 396; *Clark v. Ralls*, 50 Iowa 275.

The sale was made April 30, 1910. Nine hundred dollars was paid upon delivery, and the balance was to be paid in a few days. Some time in the following September, respondent, not having paid this balance, took the car to appellant's garage for some repairs. Appellant then refused to deliver the car to respondent until the $900 was paid. He did, however, permit respondent to use the car, sending a driver to take charge of it. This continued for about a week when, while at luncheon with this driver, respondent telephoned his wife and arranged with her to have his son come and take the car, thus depriving appellant of his possession. It would seem by this act he was not only willing but anxious to retain the car, leaving appellant to his remedy to obtain the balance due. He knew then, if he speaks the truth, that the car would not average eleven miles on a gallon of gasoline; for during this week he made a trip to Coeur d'Alene, and when appellant's counsel sought an admission from him that the car had made the trip at the rate of eleven miles to a gallon of gasoline, he answered that it did not average six miles. Nevertheless he wished to retain it, even to the extent of wrongfully depriving appellant of its possession. Under these circumstances, courts will spend little time listening to his plea of a breach of warranty. We are of the opinion that there was neither warranty nor breach, and that the judgment of the lower court in so holding is error.

The judgment should be modified, and the case remanded with instructions to enter a judgment in appellant's favor as prayed for.

MOUNT, ELLIS, GOSE, and FULLERTON, JJ., concur.

[No. 10377. Department Two. August 26, 1912.]

SAMUEL MILLER *et al.*, *Respondents*, v. SPOKANE BAKERY COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS—STREETS—USE—COLLIDING WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a pedestrian struck by an automobile while walking diagonally across a street between crossings was guilty of contributory negligence, is for the jury, where there was doubt as to whether she was paying attention to traffic.

APPEAL—REVIEW—BRIEFS. Claims of error not discussed in the briefs or mentioned in the oral argument will not be noticed on appeal.

Appeal from a judgment of the superior court for Spokane county, Black, J., entered October 14, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for injuries sustained in a collision with an automobile. Affirmed.

Cannon, Ferris & Swan and *Walter A. White*, for appellant.

O. C. Moore, for respondents.

MORRIS, J.—Action to recover damages for injuries sustained by the respondent wife, as the result of being struck by an automobile truck driven by an employee of appellant. A verdict of $1,000 was returned, and this appeal is taken from the judgment, alleging error in denying motions for nonsuit, for directed verdict, and for judgment notwithstanding verdict.

These motions all raise the question of contributory negligence on the part of Mrs. Miller, and are predicated upon appellant's contention as to the point in the street where the accident occurred, and as to whether Mrs. Miller was crossing the street at the regular crossing or whether she was

[1]Reported in 125 Pac. 1021.

walking diagonally across the street between crossings, paying no attention to traffic. Mrs. Miller's testimony is not free from doubt upon this point, but after a careful reading of her whole testimony, we cannot say appellant's theory is so well sustained as to cause us to hold, in the face of the verdict, that she was guilty of contributory negligence. The case is not similar in this respect to *Harder v. Matthews*, 67 Wash. 487, 121 Pac. 983, upon which appellant strongly relies. In that case Mrs. Harder was attempting to diagonally cross a crowded street near the middle of the block, while looking nearly opposite to the direction she was going, and stepped from behind an express wagon into the street and was immediately struck by the automobile. We held under such circumstances she was guilty of contributory negligence. The evidence before us does not establish kindred facts, to such an extent as to cause us to overrule the verdict and say, as a matter of law, Mrs. Miller was guilty of contributory negligence. No good purpose would be served by quoting the testimony as to the point in the street Mrs. Miller had reached when she was struck. Counsel do not agree in their interpretation of the testimony as to this point, and we confess to being unable ourselves to determine it. We cannot therefore say the verdict is erroneous, or that it should have been set aside.

Error is predicated upon two instructions. These claims of error are not discussed in the briefs, nor were they referred to upon the oral argument. We therefore assume counsel for appellant does not now desire to raise any question on the instructions.

Some complaint is also made upon the admission of testimony as to the distance within which the auto truck could be stopped. We find no error here sufficient to reverse the judgment.

The judgment is affirmed.

Mount, Ellis, Parker, and Fullerton, JJ., concur.

[No. 10378. Department Two. August 26, 1912.]

JOHN E. RICE, *Appellant*, v. CHARLES AHLMAN *et al.*, *Respondents*.[1]

RECEIVERS—APPOINTMENT—PROCEEDINGS—TRIAL—POWER OF COURT. Where the appointment of a receiver was prayed for, all the issues had been submitted, and the matter taken under advisement, the court had power to appoint a receiver without notice, after announcement of findings and some delay in order to enable the parties to make an amicable adjustment, where such appointment was necessary to preserve the property in suit from total loss by reversion.

JUDGES—ORDERS OUTSIDE COUNTY—TRIAL. Under Rem. & Bal. Code, § 42, a judge having heard a cause out of his district may decide and rule thereon in any other county in the state.

APPEAL—REVIEW—FINDINGS. Findings based on conflicting testimony, but amply sustained by the evidence, will not be disturbed on appeal.

ACCOUNTING—PROFITS—CONTRACT—CONSIDERATION. A party who, in consideration of a one-third interest, made advances to construct a building on leased premises, is bound to account for the net profits derived from rents, under an agreement whereby he was to collect the rents, and use two-thirds of the net income to repay his advances with interest, without specifying how the other one-third of the net profits was to be disposed of except under the general provision requiring him to account to the builders for the net proceeds of the building; such third being an asset in his hands for which he must account to the owners of the other two-thirds of the building.

APPEAL—REVIEW—HARMLESS ERROR. Upon appeal from an order decreeing an accounting, a judgment preserving to the parties property of the value of $5,000, which in case of reversal would be a total loss by reason of a reversion, will not be disturbed for technical errors.

Appeal from a judgment of the superior court for Whatcom county, Joiner, J., entered November 23, 1911, in favor of the defendants, decreeing an accounting and appointing a receiver, in an action to foreclose a mortgage. Affirmed.

[1]Reported in 126 Pac. 64.

Brown, White & Peringer, for appellant.

Neterer & Pemberton and *Waters & Downer*, for respondents.

Morris, J.—Appellant commenced this action to foreclose a mortgage upon property of respondents Ahlman, as security for a note of $500. Ahlman and wife answered, admitting the execution of the note and mortgage, and alleged affirmatively that, in February, 1906, Charles Ahlman and Calvin Smiley secured from Jacob Beck a lease of a piece of ground 76 by 45 feet, within the city of Bellingham, for the purpose of erecting a building thereon to cost $2,500; that Rice agreed to furnish the necessary money for the construction of the building, and as a return therefor was to have a one-third interest in the lease and building and a repayment of all sums furnished by him, from the rents of the building when completed. Under the terms of this agreement, Ahlman and Smiley were to erect the building, and it is alleged that the mortgage was given as an indemnity to Rice against any liens against the building, and for the fulfillment by Ahlman and Smiley of their part of the contract. The building contemplated under this agreement was a two-story structure with a street frontage of 76 feet.

Subsequently the lease was surrendered, and Rice obtained a new lease covering the same property and an adjoining street frontage of 45 feet. A new agreement was then entered into between Rice, Ahlman and Smiley, providing for the joint interest of the parties, as contemplated in the two-story building upon the 76 feet, and providing further that the original building should be extended over and upon the 45 by 45 feet, and carry a third story. The additional 45 feet frontage and the third story was to become the property of Rice. Some changes in the original structure were also provided for. Under the second contract, Rice was to have full charge of the building and the collection of rents; and it is alleged that he has collected more than enough to reimburse

him for all sums to which he is properly entitled under his agreements with Ahlman and Smiley, and that Ahlman and Smiley fully performed their part of the contracts, leaving no sum of money, as liens or otherwise, to be charged against the $500 represented by the mortgage. Respondent Parrott intervenes, claiming as assignee of the interest of Smiley, and joins with Ahlman in asking for an accounting from Rice and for the appointment of a receiver. The issues were made upon these charges, and the case went to trial. The court found generally for respondents, awarding each of them a judgment of $78.54 against Rice; sustained Ahlman's contention as to the purpose of the mortgage and its complete satisfaction, and appointed a receiver to take charge of the building. From this judgment Rice has appealed.

Appellant suggests that the lower court erred in the appointment of the receiver, in view of the fact that Judge Joiner, to whom the cause was tried in Whatcom county, made the appointment while sitting in Skagit county some days after the close of the trial, and such appointment was void because of lack of notice. Under the circumstances surrounding this appointment, we do not regard this point as well taken. Respondents Ahlman and Parrott had asked for the appointment of a receiver in their answers, and at the close of the trial insisted that such appointment be then made. The court at that time refused to make any order in the case, and gave no indication of its ruling upon the application. Subsequently and on May 16, 1911, Judge Joiner at Bellingham announced his findings in favor of respondents. At that time, only about three weeks remained of the time under which the building could, under the terms of the lease, be disposed of or removed by the parties to this action. It seemed to the court under these circumstances that the parties should agree upon an amicable adjustment of the matter, and the appointment of a receiver was delayed in order that such opportunity might be given them. They, however, failed to agree; and on May 31, the court, upon being so advised, made

the appointment and directed the receiver to either sell or remove the building. At this time only about ten days remained in which the building must be removed or sold. Otherwise it would revert to the ground owner and result in an entire loss to all parties. All parties were still in court, the appointment of a receiver was prayed for, and the matter submitted to the court upon all the issues. This gave the court ample power to appoint a receiver. It was one of the matters submitted to it by the issues in the case. 34 Cyc. 122, 124. There is no valid objection because of the fact that the order was made in Skagit county. Under Rem. & Bal. Code, § 42, the judge, having heard the cause in a county not within his district, might decide and rule upon any matter in issue in any county within the state.

Upon the questions of fact submitted by the appeal, it is impossible to refer to them in any ordinary opinion. The challenged items in appellant's account number over 300. The court below made no findings, and it is impossible to ascertain with any degree of certainty what the court's position is as to each of these contested items, or what use has been made of them in arriving at the judgment entered. The record is, however, ample to support the judgment.

Respondents, while not taking any cross-appeal, contend that the court should have charged appellant with a much larger sum, and in their brief they point out what they contend should have been the true accounting between the parties, which would make the awards to respondents much larger than those fixed by the court, and ask that such increase be here made. The appellant also prints his theory of the award the court should have made. The figures to be used in making any award are to be determined as the facts are gathered from the witnesses, who in many cases are in direct conflict. In other cases figures have been changed from one account to another. Even experts differ as to the relative costs to be charged to the different parts of the building, both in construction and subsequent maintenance. That the

evidence is sufficient to sustain the judgment cannot be disputed. The chief question is, to whom shall credence be given. If there ever was a case where an appellate court should say it would not disturb the findings or judgment of the court below where there is ample sustaining evidence in the record and the same is based upon conflicting testimony, this is one.

Special reference might be made to some of the contentions of appellant based upon what he contends is an improper construction of the contract between appellant and Ahlman and Smiley. That contract, after providing for the construction and leasing of the building and other matters relating thereto, provides that,

"The total income and rents received from such premises shall be devoted to the payment, first of the ground rent provided for in said leasehold estate, and second, to the payment of taxes, insurance, repairs and betterments, and the expense of maintenance, after which the two-thirds of the net income shall be paid to the liquidation and discharge of the said two thousand five hundred dollars advanced [by appellant] for the construction of such building with interest thereon upon five hundred dollars, computed at the rate of twelve per cent per annum until the whole of the said two thousand five hundred dollars shall have been paid."

Appellant now contends that the court below, in arriving at its judgment, has charged appellant with all of the net receipts, instead of with only two-thirds thereof as provided for in the contract. As before intimated, it is impossible on account of the lack of findings to determine just what disposal the court made of any one item in this long account, or how he obtained the results upon which the judgment is based. The contract provides how two-thirds of the net income shall be disposed of. It makes no disposition of the remaining one-third, to whom it shall belong or how it shall be treated. It was, therefore, an asset in the hands of appellant, to be disposed of on this accounting as the equities of the situation might demand, under the general provision of the

contract requiring appellant to account to Ahlman and Smiley for the net proceeds of the building. Whatever might be the ultimate disposition of this one-third of the net receipts, it was certainly proper in the first instance to charge appellant with all the moneys he received as income from the building, leaving him to be credited with such items as the accounting might show him entitled to retain, after awarding respondents what was their due. That this was appellant's own theory is demonstrated by the fact that he testified that, under his contract, the entire net income was to be used in repaying the money advanced in the construction of the building; and in statements rendered by him to attorneys for respondents, long prior to the commencement of this suit, he made no claim as to this item. In one of his proposed findings, he also asks the court to find that the income from the building has more than repaid all proper charges against it, provided the entire income be applied upon the cost of construction. In fact, it is practically admitted by all the parties that the building had more than repaid all proper charges against it, and the only question to be determined by the court was as to how the balance remaining in the hands of appellant should be divided upon this accounting.

Complaint is also made that, under the contract, appellant was to be allowed brokerage for his collection of the rents and general supervision of the building, and that the court failed to make him such an allowance. We find in the record however, when counsel for appellant called the court's attention to this alleged omission, the court replied to him: "I think if the court passed on it now, it would not allow you brokerage; but in the figures I made I did." So with many other assignments of error claimed by appellant, the record does not disclose that they are well taken. We are not convinced that the record demands that the conclusion reached by the court should be disturbed. In fact, upon the whole record, it would appear most inequitable to do so. Under the forfeiture clause in the lease, the building, if this judgment be

reversed and the receiver discharged, would revert to the owner of the ground upon which the building is situate, and a total loss to all parties will result. As it is now, there is a fund of $5,000 in the hands of the receiver, obtained from the sale of the building, to be divided between the parties hereto as their interests have been determined by this judgment; which awards appellant approximately a seventy-two per cent interest in the building. It is the duty of a court of equity to preserve to all parties litigant the fruits of their litigation, and not to destroy them because a few irregularities may have crept into the judgment which can have no disturbing force when compared with the greater benefit and more equitable results to be obtained in enforcing the judgment.

The judgment is therefore affirmed.

MOUNT, ELLIS, CROW, and FULLERTON, JJ., concur.

[No. 10223. Department Two. August 26, 1912.]

JOHN E. RICE, *Trustee, Plaintiff*, v. CHARLES AHLMAN *et al.*, *Respondents*, JACOB BECK, *Appellant*.[1]

JUDICIAL SALES—BIDS—JURISDICTION OVER PURCHASER. The purchaser at a receiver's sale made under order of court submits himself to the jurisdiction of the court, and may be compelled to comply with his bid by rule in the original case.

FRAUDS, STATUTE OF—JUDICIAL SALES. Judicial sales do not fall within the statute of frauds.

Appeal, by the purchaser at a receiver's sale, from an order of the superior court for Whatcom county, Joiner, J., entered November 23, 1911, confirming the sale and directing payment of the purchase price. Affirmed.

[1]Reported in 126 Pac. 66.

John R. Crites, for appellant.

Neterer & Pemberton and *Waters & Downer*, for respondent Livesey.

Morris, J.—This is a separate appeal in the case of *Rice v. Ahlman*, *ante* p. 6, 126 Pac. 64, and grows out of the orders of the court in appointing the receiver and in enforcing a sale of the building by the receiver to the appellant Beck, who is the owner of the ground upon which the building is located. The receiver, upon his appointment, was directed by the court to either remove or sell the building within the time then remaining when, under the terms of the lease, the building could be removed or otherwise disposed of, a period of about ten days. Upon being so directed, the receiver sought Beck and reported to the court that he had sold the building to him for the sum of $5,000, but that Beck had delayed completing the sale by refusing to accept title from the receiver and pay the agreed price. The court thereupon made an order directing Beck to show cause why he should not be required to complete his purchase and pay the receiver the sum of $5,000. This order was quashed by the court on November 3, 1911, for the reason, we gather from the record, that the court assumed, since it was made in Skagit county, jurisdiction was doubtful. The court thereupon, on the same day while sitting in Whatcom county, made a second order directing Beck to appear in court November 23, 1911, and show cause why the prayer of the receiver should not be granted, and directed service of this second order to be made upon Beck and all other parties litigant in the original suit. The matter coming on finally to be heard after the court had overruled numerous attacks upon its jurisdiction made by Beck, the court found that, on June 2, 1911, Beck purchased the building and other property from the receiver for the sum of $5,000, entered its order confirming the sale, and ordered Beck to pay the purchase price to the

receiver within thirty days. From this order, Beck has appealed.

The first contention is that the order appointing the receiver is void, because made within Skagit county and without notice. This error has been disposed of in the main case and will not be treated further. A second contention is that no process was served upon Beck making him a party to the action, and that the court could not acquire jurisdiction over him by the service of the show cause order. The show cause order was not issued nor required to subject Beck to the jurisdiction of the court. He became a party and subjected himself to the jurisdiction of the court when he became a purchaser at the receiver's sale. This was a judicial sale made under direct order from the court. The jurisdiction of the court over purchasers at a judicial sale is well settled. From the time he enters into a contract of purchase at a judicial sale, the purchaser becomes a party to the action by voluntarily submitting himself to the jurisdiction of the court, and he may be compelled to comply with his bid by rule in the original case. *White v. Rand* (N. Y.), 21 N. E. 97; *Archer v. Archer*, 155 N. Y. 415, 50 N. E. 55, 63 Am. St. 688; *Robertson v. Smith*, 94 Va. 250, 26 S. E. 579, 64 Am. St. 723; *Andrews v. O'Mahoney*, 112 N. Y. 567, 20 N. E. 374; 24 Cyc. 30, 52; 34 Cyc. 327; 12 Ency. Plead. & Prac., 65.

The third contention is that the statute of frauds applies, and as no part of the purchase price was paid and no memorandum made, the sale cannot be enforced. There is no merit in this contention. Judicial sales do not fall within the statute of frauds, and are not subject to its requirements. *Andrews v. O'Mahoney, supra; Warfield v. Dorsey*, 39 Md. 299, 17 Am. Rep. 562; *Chandler v. Morey*, 195 Ill. 596, 63 N. E. 512.

Finding no error in the proceedings, the order and judgment appealed from is affirmed. Appellant will be given thirty days from the filing of the remittitur in the lower court

to comply with the order and pay the purchase price fixed by the court, with interest thereon from June 2, 1911.

MOUNT, ELLIS, CROW, and FULLERTON, JJ., concur.

[No. 10416. Department One. August 26, 1912.]

In re Estate of MARTHA J. TRESIDDER.[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY—CONVEYANCE TO WIFE—FORM. Where the husband had charge of a transaction whereby property was conveyed to the wife, as and for her sole and separate property, the form of the deed is binding upon him, and the property becomes her separate property.

WILLS—EXECUTION—UNDUE INFLUENCE. Undue influence will operate to defeat a will, although the testatrix was mentally competent, where there was coercion, imposition, fraud, or influence impelling the testatrix to act in fear, desire for peace, or something which she was unable to restrain.

WILLS—UNDUE INFLUENCE—EVIDENCE—COMPETENCY. Undue influence in the execution of a will need not be shown by direct evidence, but it is competent to show the relations of the parties, the surrounding circumstances, habits and inclinations of the testatrix, and the fact that provision had been made for a son in four or five wills previously executed.

WILLS—CONSTRUCTION. A clause in a will asking the sole beneficiary to "make provision for my son R. as requested by me," must be construed in the light of several former wills in favor of R. and the circumstances surrounding its execution.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF. While ordinarily the burden of proof is upon the contestant of a will claiming undue influence, sufficient is shown to put the executor to his proof that there was no undue influence, where it was shown that the will was in the handwriting of the sole beneficiary, that although he knew of a former will in favor of a son, he kept its repudiation secret, and that he took care to have a physician act as witness in order to preserve proof of mental capacity, in view of former wills in favor of, and an admitted attachment for, the son.

SAME—EVIDENCE—SUFFICIENCY. In such a case, undue influence is sufficiently shown, where in addition to such facts, it appears that the testatrix, then on her deathbed, had, on the day before, executed

[1]Reported in 125 Pac. 1034.

a will making provision for a son, the next day executing the contested will making her husband her sole beneficiary with a clause asking that he make provision for the son "as requested" by her, that the testatrix was in a very weak condition, and had a great attachment for her son and frequently expressed an intention to leave him her property.

WILLS—PETITION FOR PROBATE—RIGHT TO WITHDRAW—ELECTION. The contestant of a will, who petitioned for the probate of a prior will, cannot, upon winning his contest, withdraw his petition for probate of the will proposed by him, nor waive a lesser share under such will to take a greater share under the statutes of descent.

Appeal from a judgment of the superior court for King county, Frater, J., entered November 6, 1911, upon findings in favor of a contestant of the probate of a will. Affirmed.

Frank A. Noble and *Peters & Powell*, for appellant.

Brady & Rummens (*W. D. Peters*, of counsel) for respondent.

CHADWICK, J.—Martha J. Tresidder and Thomas W. Tresidder were married in the state of New York, in the year 1890. At the time of their marriage, Mrs. Tresidder was a widow, with one son, Richard Seymour Conklin. A short time after they were married, Mr. Tresidder came west, and after a time he was followed by Mrs. Tresidder and her son. It is contended that the major part of the property owned by Mr. and Mrs. Tresidder at the time of her death was the accumulated earnings of the sums she brought with her from New York. Her son testifies that she had about her person a sum in excess of $9,000, when she left New York. We are inclined to believe that he is mistaken in this, for it seems that Mrs. Tresidder pawned her diamond earrings to bring the two of them from Bonner, Montana, to Seattle. The son, who was employed in a hotel, was left behind for a time. So far as the record shows, Mr. and Mrs. Tresidder struggled against adverse circumstances for several years. He followed various employments, and Mrs. Tresidder kept roomers and for a time worked in a real estate office.

In 1897, Mr. Tresidder induced a party with some capital to bank it against his experience, and they started a small lumber business. This was sold out in January, 1901, Mr. Tresidder receiving $8,400 for his share. On the 9th day of March, 1901, there was deeded to Mrs. Tresidder two lots in Union addition to the city of Seattle. The consideration was $2,700, and the deed recites that the property was sold and conveyed to Martha J. Tresidder "as and for her sole and separate property, use and benefit, and not as community property." There is much controversy over the status of this property, but it is our judgment that, wherever the money may have come from, the form of the deed (Mr. Tresidder having had charge of the transaction) would bind him to its terms, and that the property became the separate property of his wife. Prosperity measured in dollars seems to have followed the Tresidders from this time on. Mrs. Tresidder died May 22, 1910. The appraised value of the whole estate was about $67,000.

From the time that prosperity began to dawn on them, Mrs. Tresidder seems to have developed a penchant for executing wills, the first will being drawn in 1901 at about the time the property which became the home property had been deeded to her. This circumstance, though slight, tends to discredit the testimony of Seymour that Mrs. Tresidder brought $9,000 with her and had always been possessed of some means. People without means do not as a rule make wills, although our literature is adorned with one purporting to be the will of a pauper. We are, therefore, disposed to believe that the whole of the property, saving and excepting only the home property, is community property.

Mrs. Tresidder became ill of tuberculosis in 1909, and rapidly declined in health, and for a time before her death was unable to sit up in bed or to assist herself in any way. On May 18, at the solicitation of her son Seymour, Mr. Walter D. Peters went to the home of deceased, and in his presence and in the presence of one Margaret Hopkins, a trained

nurse, Mrs. Tresidder executed a will, the material parts of which follow:

"First: I give, devise and bequeath unto my son, Richard Seymour Conklin, of Seattle, aforesaid lot one (1), north five feet of lot two (2) of and in block sixteen (16) of Union addition to the city of Seattle, county of King, state of Washington, U. S. A., house and lot and all of its contents, and all of my personal property, including my jewelry, and the money in the Scandinavian-American Bank, of the aforesaid Seattle, Washington, of which I may die possessed.

"Second: I give, devise and bequeath all the rest, residue, of my estate be the same real or personal or mixed and wheresoever situated, equally unto my said son, Richard Seymour Conklin, and unto my husband, Thomas W. Tresidder, both of Seattle, Washington, share and share alike."

Her mental capacity to execute this will is not denied. Consequently we shall not discuss it. On May 19, so the testimony on behalf of Mr. Tresidder shows, Mrs. Tresidder told the nurse to telephone to Mr. Tresidder and ask him to come to the house. When he arrived she is reported to have said: "Oh, papa, I have done something I want to tell you about," that she then said that she had executed the will which we have just referred to, and that she felt that it was "forced on her." Mr. Tresidder then prepared in his own handwriting a will which his wife attempted to execute; but having misspelled her name, he made another draft of the will which was properly signed. The will is as follows:

"I Martha J. Tresidder, of Seattle, Washington, being of sound mind and fully able to make a will, do hereby will and bequeath all of my property both real and personal of which I may die possessed to my husband, Thomas W. Tresidder of Seattle, Wash.

"I ask my husband, Thomas W. Tresidder, to make provision for my son, R. Seymour Conklin, as requested by me.

"I appoint my husband, Thomas W. Tresidder as administrator of my estate without bonds.

"All other wills that may have been made by me before this are void."

This will was admitted to probate on June 1, 1911. On July 6, the son Seymour filed a contest, setting up that Mrs. Tresidder was not mentally competent to make the second will; that she had been overreached and unduly influenced by her husband who was made her sole legatee. He also offered the will first quoted for probate.

Without reviewing the evidence, we believe that, although Mrs. Tresidder was in a very weak and emaciated condition, she was nevertheless mentally competent in the sense that she understood what she was doing. The right of a party to change his will at any time, so long as he has capacity to do so, cannot be questioned. Nor will a showing of mere persuasion on the part of a beneficiary overcome the will of a party, if from the whole record it is made to appear that it is his will. It is not influence alone, but an undue influence, which has been defined to be such an influence as deprives the party of the free exercise of his intellectual powers, an influence which is exercised by coercion, imposition, or fraud, an influence which impels the testator to act in fear, a desire for peace, or some feeling which he is unable to restrain. 8 Words & Phrases, 7166, 7172. *In re Patterson's Estate*, 68 Wash. 377, 123 Pac. 515.

From the very nature of things, undue influence can rarely be proved by direct evidence. The relations of the parties, surrounding circumstances, the habits and inclinations of the testator, his purposes and wishes expressed at times when his words were clothed with the likelihood of truth, all furnish competent sources for the guidance of the courts when called upon to decide a case of this kind. *In re Patterson's Estate, supra; Rollwagen v. Rollwagen*, 63 N. Y. 504. There is no "uniform rule capable of application apart from the facts of each case." Wigmore, Evidence, § 2503.

To sustain the second will, the one proposed by Mr. Tresidder and admitted to probate, he seeks to show that the property was all accumulated through his efforts; and because of his business acumen, the mother felt that, because

of her son's habits, he being addicted to the use of intoxicating liquors and occasional sprees, he was unfit to handle money or property, and it was better to leave all of her property to her husband; that he was attached to his wife and she to him; that the son is a profligate and ne'er do well, and has been supported in the main by his stepfather and mother ever since their marriage.

On the part of the contestant, testimony has been offered to show that Mrs. Tresidder had frequently expressed the opinion that her husband had no affection for her; that she kept accounts and books and had money on deposit in her own name which was unknown to Mr. Tresidder at the time of her death; that she was deeply attached to her son and he to her, and on frequent occasions she had expressed her affection for him and her intention to leave him her property; that she had executed no less than five separate wills, in all of which she indicated an intention to provide for her son by way of specific devise; that she had executed a will in 1901 in which she had devised a part of her property to her husband, but thereafter, in all of the wills she had executed, she had favored her son to the exclusion or partial exclusion of her husband; that in one of these wills she had named a stranger as a joint executor to act with her son; that all of these wills had been concealed from her husband, as was also the fact that she carried money on deposit in her own name in the banks; that although contestant was in the house at the time the last will was drawn, its execution was concealed from him; that the will as drawn and probated in effect disinherited her son, and it is so understood by Mr. Tresidder, who served a written notice on Seymour to move out of the house a few days after his mother's death and to seek lodgings elsewhere. There is further testimony tending to show that the contestant is an architectural draftsman and has supported himself except during the two years just preceding his mother's death; that during that time he was in constant association with his mother, and nursed her up to a month or two preceding her

death; that he has contracted tuberculosis from his mother and is now its victim, and that this fact was known by her before she executed either of the wills now before the court. It is further shown that Mr. Tresidder drew the will with his own hand; that the deceased could not, or at least did not, spell her name correctly in the first draft of the will, and that a new one had to be made; that Mr. Tresidder waited until the next day in order to get the attending physician to act as a witness, and that he did this over the suggestion of the nurse, although neighbors were handy and might have been called. The position of Mr. Tresidder is strongly supported by the nurse, but her testimony is not entirely satisfactory, and it is evident that the trial judge did not credit it. She was, to say the least, neither a frank nor apparently a disinterested witness. Upon this showing and minor details, not now necessary to rehearse, the court annulled the order probating the will proposed by Mr. Tresidder.

It will be seen that the case is not without difficulty, which furnishes an additional reason for following the trial court in its judgment. "In cases of this character the conclusions of the surrogate are highly important." *Rollwagen v. Rollwagen*, 3 Hun 121. That there is something, or was something, connected with the execution of the last will that has not been disclosed, we have no doubt. It is indicated by all the proved facts. To ascertain the will of a party, it is proper to look to the purpose of the testator. The naturalness of the act is a strong supporting circumstance, and has ever been the readiest weapon of those who would sustain a will. That it had ever theretofore been the intention of the testatrix to care for her son there is not the shadow of a doubt. The four or five wills previously executed are competent evidence to prove this fact. *Seale v. Chambliss*, 35 Ala. 19. That Mrs. Tresidder was not unmindful of the care and attention and faithful devotion of her son is certain. Mr. Tresidder states that Seymour was very gentle with his

mother during her last illness. Having the means, she must have intended—in fact, the last will asserts, although ineffectually—that her son, who had so tenderly cared for her and whom she had provided for in her previous wills, should not go entirely stripped of her bounty.

We find, and we have no doubt that the trial judge found, the key to this case in the second clause of the will: "I ask my husband Thomas W. Tresidder to make provision for my son R. Seymour Conklin as requested by me." This clause should be construed in the light of all former wills and the circumstances surrounding its execution. We have no doubt that, when Mr. Tresidder found that his wife had made a will favoring her son, he put before her the same theory we find expressed in his testimony and maintained by counsel; that is, that the son was addicted to the intemperate use of liquor; that to leave him a part of the property would be to unnecessarily handicap a business that he had built up by his own efforts, and that if she would leave the matter to him he would do as she "requested." This clause indicates the true intention of the testator. What had she "requested?" Not merely that the son be provided for. If that were all, the use of the precatory words was sufficient, and the words "as requested by me" are redundant to that intention. The use of the words "as requested by me" (and we must give every word a meaning if we can) indicates a way, a manner, or a method. This then brings us to one of two propositions. Either the will operates to totally disinherit the son—and indeed Mr. Tresidder has put that construction upon it—or its meaning depends upon oral evidence which it is impossible to reveal, for it lies in the conscience of the sole legatee. The will "to provide . . . as I have requested" depends upon the unexpressed oral promise of the devisee. Dangerous indeed would be the doctrine that would sustain a will of that kind under the admitted facts of this case. There seems to have been no particular affection between the son and husband. There is no tie of blood. The

provision quoted, if the son was of tender years and the sole beneficiary was the father, would be a natural expression. But here it is highly improbable that Mrs. Tresidder rescinded the will and intent of years' standing, unless she had some specific promise to do as she requested. The will is in a sense the will, but not the whole will, of the deceased.

It may be noted as a circumstance sustaining our theory that the reason—the habits and ill health of the son—that must have prompted the suggestion that Seymour be provided for "as requested," is the very same reason urged by Mr. Tresidder for repudiating the duty to provide. The case of *Rollwagen v. Rollwagen*, 3 Hun 121; *Id.*, 63 N. Y. 504, is similar to this. The evidence there showed, that there was no real love between the husband and wife; that there was a bond of sympathy and affection between the deceased and his children; that the devises were exclusively for the benefit of the wife who proposed the will; that she had arranged and managed all details leading up to its execution; that the children of decedent were not apprised of what she was doing or had done; that he had executed previous wills dealing fairly with his children and grandchildren; that nothing was shown to have occurred in the meantime which could naturally be expected to produce changes in his intent and will. These facts, combined with his enfeebled condition, justified the court in rejecting the will, although there was no direct evidence of undue influence to sustain its judgment.

It is earnestly maintained that the burden of proof is on the contestant, and that this burden has not been sustained. This is true as a general rule, but when it is shown that the will as proposed is in the handwriting of the sole beneficiary; that, although he knew of the will in favor of the son, he did not bring the fact of its repudiation to his attention; that care was taken to have a physician act as witness in order to preserve the proof of mental capacity, we think enough has been shown, when considered in the light of the former wills

and the admitted attachment between mother and son, to put the executor to his proof that there was no undue influence. It is our judgment that this burden has not been sustained.

At the close of the trial, counsel for contestant withdrew his prayer for the probate of the will offered by him; this for the evident purpose of reducing the estate to one of intestacy. This he could not do. The original petition for probate of the repudiated will and its contest invested the court with jurisdiction of the estate, and under that proceeding, the court was vested with full authority and jurisdiction to administer the estate; and it appearing that the will offered by the contestant is a valid will, it becomes the duty of the court to execute it. The contestants are not alone concerned. The state has an interest in the administration of every estate, and its courts having acquired jurisdiction, it will be exercised to the end. Contestant might have withdrawn his contest, but he cannot withdraw his petition for probate of the will proposed by him.

"It would be a strained construction of the law as to probate of wills if the court should be compelled to hold that after a will was presented for probate, and presumptively proven by the executor [proponent or contestant], he could discontinue the whole proceedings. He was not a party to the record with any such power. The executor could not suppress a will before it be offered for probate or afterwards." *In re Lasak's Estate*, 57 Hun 417, 10 N. Y. Supp. 844.

See, also, *Bonds v. Gray*, 2 Ga. Dec. 136, pt. 2.

This is especially true where the effect of the waiver or dismissal would be to put the proponent in a better position than he would be in if he relied on the will. Mr. Tresidder has an equal interest in the residue of the estate under the will; whereas, if the estate be intestate, he would take nothing but his own share of the community property. We have found no case bearing directly on this point, but it may be resolved by reference to the doctrine of election. A legatee may elect to waive the greater and take the lesser share, but he cannot waive the lesser share under a will and take a greater share

under the statutes of descent. If it were so, it would be always possible to defeat the will and intention of the testator.

The decision of the lower court is affirmed, and the case remanded with instructions to proceed to execute the will proposed by the contestant.

Gose, Crow, and Parker, JJ., concur.

[No. 10356. Department One. August 26, 1912.]

Nick Girocamo, *Respondent*, v. W. L. Tribble *et al.*, *Appellants*.[1]

Master and Servant—Negligence—Incompetent Fellow Servants—Evidence—Sufficiency. In an action for injuries sustained when a stone moved by a derrick struck one of the men, it is not sufficient evidence that the derrickman was incompetent that he had worked as a derrickman on this job but two days, and that a short time before, when a stone struck the car, the superintendent had rebuked the gang and instructed the derrickman.

Appeal—Review—Instructions. Instructions to the jury become the law of the case, so far as respondent is concerned.

Trial—Province of Court and Jury. Whether there is any evidence of a fact in issue is a question for the court.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 18, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in the operation of a derrick. Reversed.

Smith & Mack, for appellants.

Prather & Saunders, for respondent.

Gose, J.—The plaintiff brought this suit to recover for personal injuries sustained while working for the defendant Tribble. From a verdict and judgment in his favor against Tribble, the latter has appealed.

[1]Reported in 126 Pac. 67.

The appellant, at the time the respondent sustained the injury complained of, was engaged in grading a railroad track. The work was in a deep rock cut, and was carried on in the following manner: The stone from the cut was raised and placed upon a car by means of a derrick and then hauled away. A horse was used for power to operate the derrick. The derrick was composed of a mast, boom, drums and cable. The cable extended from the drums through pulleys at the base and apex of the boom, and was of sufficient length to extend from the top of the boom to the object to be removed. There was a hook upon the end of the cable, which was placed in a chain around the stone desired to be moved. A guy rope was attached to the chain at a point near the stone, for the purpose of controlling its course and getting it upon the car. The respondent and three or four other men held the guy rope. The man who drove the horse acted as the signalman. The derrickman operated the gear and brake levers. These controlled the cable.

The negligence charged is, that the stone which struck the respondent was lying a few feet from the end of the boom; that the derrickman moved it too rapidly, thus causing it to swing and strike the respondent; that the derrickman was incompetent and negligent, and that his incompetency was known to the appellant.

The appellant, at the close of the respondent's evidence, and again at the close of all of the evidence, moved for a directed verdict. The denial of these motions constitutes the first and principal error relied upon. We think that both motions were well taken. The only evidence tending to show the incompetency of the derrickman is this: The respondent and his three witnesses began working for the appellant on the Saturday morning preceding the accident, and worked that day, a half of Sunday, and Monday morning for about two hours, when the respondent was injured. The derrickman who is charged with incompetency drove the horse on Saturday and operated the derrick on Sunday and

Monday. A short time before the respondent was injured, a stone which was attached to the cable struck the car. The appellant's superintendent then got upon the platform of the derrick, and according to the testimony of the respondent's witnesses, cursed "the whole gang," and gave the derrickman instructions. The work then proceeded and a short time thereafter the respondent sustained the injury. His testimony is that the stone was moved too fast, and that it was so large that the men at the guy rope could not control its course.

There is no evidence as to what caused the stone to strike the car. The appellant's counsel asked the witnesses what caused it to strike the car, and an objection was interposed and sustained. The respondent and his witnesses testified that they did not know whether the derrickman had operated a derrick before they commenced work. The mere fact that the derrickman drove the horse on Saturday does not tend to prove that he had not theretofore operated a derrick, nor that he was an incompetent derrickman. Nor does the fact that a stone had struck the car a short time before the accident and that the superintendent thereupon rebuked the "gang" and directed the derrickman, tend to prove that he was either incompetent or negligent. It is quite clear that the respondent's testimony is insufficient to establish incompetency. Moreover, the appellant's testimony, which stands undisputed, is that the derrickman had successfully operated a derrick for three or four weeks before the happening of the accident, and that he continued to do so for months thereafter without accident. The court instructed the jury that the derrickman was a fellow servant of the respondent; that the respondent was required to prove, first, that the servant was incompetent, and second, that the master knew it, or that, "in the light of the evidence," should have known it. The instruction became the law of the case so far as the respondent is concerned. This case is controlled by the case of *Long v. McCabe & Hamilton*, 52 Wash. 422, 100 Pac. 1016. In

that case, in discussing the controlling principles of law where the negligence relied on was the employment of a servant charged to be incompetent, we said:

"Negligence of the master in the performance of this duty will not be presumed from the mere occurrence of an accident, the result of a negligent act. It is a fact to be proved by plaintiff. He must show by a preponderance of the evidence two things: that the servant was incompetent, and that the master knew, or should have known, of his incompetency in the light of all the evidence."

We also said that it cannot be declared, as a matter of law, that a competent man is never negligent, and that "the duty of measuring the evidence, not as to its weight but its legal effect, is put upon the court." So in this case, the duty of determining whether there is any evidence of the incompetency of the derrickman is put upon the court, and our conclusion is that the appellant failed to overcome the presumption that obtains in all cases, viz., that the master has used reasonable care in the selection of the servant.

The judgment is reversed, with directions to enter judgment for the appellant.

PARKER, MORRIS, and CHADWICK, JJ., concur.

[No. 10284. Department One. August 26, 1912.]

CHARLES F. FORD, *Respondent*, v. AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *Appellant*, JOHN GERRICK *et al.*, *Defendants*.[1]

INSURANCE—INDEMNITY INSURANCE — CONTRACT — CONSTRUCTION—ASSUMPTION OF DEFENSE—LIABILITY. A policy of indemnity insurance indemnifying an employer against loss "actually sustained and paid in money by him after actual trial of the issue," indemnities against loss only and not against liability, and is not enlarged by stipulations reserving to the company the right to defend the suit and the fact that the company assumed the defense.

FRAUDS, STATUTE OF—DEBT OF ANOTHER. Where an insurance company was liable on an indemnity policy only after actual payment of the judgment, the agent's oral promise to plaintiff to pay the judgment was the promise to pay the debt of another, and void as within the statute of frauds.

CONTRACTS—CONSIDERATION. A promise to pay one's own judgment is without consideration.

ESTOPPEL—EQUITABLE ESTOPPEL. Where judgment debtors were insolvent at the time judgment was entered and conditions did not change, a subsequent promise to pay the judgment by one who was garnishee therefor, does not estop the garnishee from denying liability to the judgment debtor.

GARNISHMENT—RIGHTS ACQUIRED. The plaintiff in garnishment acquires no better right to the debt than his debtor has.

PLEADING—DEPARTURE—GARNISHMENT. It is a departure for plaintiff in garnishment to seek recovery from the garnishee on the theory that the garnishee was indebted to the plaintiff.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 16, 1911, in favor of the plaintiff, upon withdrawing from the jury an issue in garnishment proceedings. Reversed.

Post, Avery & Higgins, for appellant.

Merritt, Oswald & Merritt and *Belt & Powell*, for respondent.

[1]Reported in 126 Pac. 69.

Gose, J.—In 1910 the defendants Gerrick were engaged as contractors in doing the structural iron work on the Old National Bank building, in the city of Spokane. The plaintiff was working on the building, but not in their employ, and while so engaged was injured through their negligence. He thereupon commenced an action against them for damages, which terminated in a judgment in his favor for $2,476 and costs, on the 29th day of October, 1910. The Aetna Life Insurance Company, hereafter called the appellant, having theretofore issued to the Gerricks a casualty policy, assumed the defense for and in the name of the Gerricks. No part of the judgment has been paid.

On the 20th day of January, 1911, one of the attorneys for the plaintiff filed his affidavit for a writ of garnishment in harmony with the provisions of the code, Rem. & Bal., § 682 *et seq.* The affidavit alleges the recovery and nonpayment of the judgment; that the plaintiff has reason to believe, and does believe, that the appellant "is indebted to the above named defendants, and that it has in its possession and under its control personal property and effects belonging to the said defendants." On the same day, a writ of garnishment was issued, directed to the appellant as garnishee, commanding it to appear and answer upon oath "what, if any, you are indebted to said defendants and were when this writ was served upon you, and what effects, if any, of the said defendants you have in your possession or under your control, and had when this writ was served upon you."

In due time the appellant answered that it was not then, and was not when the writ was served upon it, indebted to the Gerricks in any sum, and that it did not then have, and did not have when the writ was served upon it, any of their effects in its possession. The plaintiff in reply alleged that prior to April 16, 1910, the appellant issued to the Gerricks "an employers' liability policy," insuring them against liability for damages up to the sum of $5,000, for any accident or injury to any one suffered through their negligence or the neg-

ligence of their employees; that on the date stated the Gerricks were engaged in the erection of the Old National Bank building in the city of Spokane; that on that day the plaintiff, while working on the building, sustained an injury through the negligence of the Gerricks; that he thereafter commenced an action against them to recover damages for the injuries, which terminated in a judgment in his favor, on the 29th day of October, for the sum of $2,476 and costs; that the appellant employed counsel to represent them to resist and contest the action, and that "about the time of the entry of the judgment," the Gerricks became and have since remained insolvent.

With the consent of the court, the appellant answered, admitted the issuance of a "casualty policy," set forth its terms, and alleged that, before the commencement of the garnishment proceedings, it settled with the assured all of its liability under the policy. The plaintiff, in his amended reply to the answer, alleged that he was threatening to enforce the judgment against the Gerricks and the appellant, and that his attorney "was informed by Vincent A. Hancock, auditor and agent of the said insurance company and authorized to act for and bind said company in the matter of the settlement of said judgment, that said company would pay said judgment, but that it would require two or three weeks to obtain the money from the head office of said company in the east to pay said judgment, and if plaintiff would take no steps to collect or enforce said judgment said company would pay it within two or three weeks;" that he relied on that statement, and delayed taking any steps to enforce or collect the judgment until the commencement of the garnishment proceedings; that if the policy was settled, the settlement was made without consideration and fraudulently, for the purpose of preventing him from collecting or enforcing the judgment, and that the appellant had knowledge at all times that the financial condition of the Gerricks was such that the judgment could not be enforced against them and knew that they

had no property on which execution could be levied. The appellant seasonably moved against all affirmative matter pleaded by the plaintiff subsequent to the original affidavit. There was a judgment for the plaintiff against the appellant, for the sum of $2,729.35 and costs. This appeal followed.

Mr. Powell, one of the attorneys for the respondent, testified that he went from Spokane to Seattle as a representative of the respondent, for the purpose of collecting the judgment against the Gerricks; that he there had a conversation with Mr. Hancock, the appellant's inspector and auditor, in which witness told him that he wanted the judgment paid; that he believed the appellant had to pay it; that "we" were expecting it to pay it; that "we" were going to collect it from the appellant or the Gerricks "one or both of them;" that it was "liable to pay it direct to us," and that Hancock finally said that, if witness would let the matter rest, "they would pay the judgment." The respondent relies upon this testimony and the provisions of the policy to sustain the judgment.

The policy runs direct to the Gerricks, and provides that, in consideration of the premium, the appellant "does hereby agree to indemnify the assured against loss . . . arising or resulting from claims upon the assured, for damages on account of bodily injuries . . . suffered . . by any person or persons not employed by the assured" by reason of the business covered by the policy. It provides that "the insurance is subject to the following conditions:"

"B. If suit is brought against the assured to enforce a claim for damages covered by this policy, he shall immediately forward to the company every summons or other process as soon as the same shall have been served on him, and the company will, at its own cost, defend such suit in the name and on behalf of the assured.

"C. The assured, whenever requested by the company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals, but the assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any

legal proceeding, or incur any expense, or settle any claim, except at his own cost, without the written consent of the company previously given, except that the assured may provide at the company's expense such immediate surgical relief as is imperative at the time of the accident.

"D. No action shall lie against the company to recover for any loss . . . or expense under this policy unless it shall be brought by the assured for loss . . . or expense actually sustained and paid in money by him after actual trial of the issue. . . .

"N. The company's liability for loss on account of an accident resulting in bodily injuries and / or death to one person is limited to five thousand and no / dollars ($5,000); and, subject to the same limit for each person, the company's total liability for loss on account of any one accident resulting in bodily injuries and / or death to more than one person is limited to ten thousand & no / dollars ($10,000). The company will, however, as provided in Conditions B and C hereof, pay the expense of litigation in addition to the sum herein limited and will also pay all costs taxed against the assured in any legal proceeding defended by the company, and interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the company's liability herein expressed."

Counsel for the respondent state their position as follows:

"It is our contention that, when the assured defends, the insurance is indemnity insurance; and when the company defends, the insurance is liability insurance. In other words, that, by defending and by taking entire charge of the litigation, the company assumes the payment of the judgment rendered against the assured, and condition D does not apply, and the insurance is changed from indemnity to liability insurance."

As we have stated, the appellant conducted the defense for the Gerricks in the suit wherein the respondent recovered the judgment against them. We cannot assent to the respondent's interpretation of the policy. The policy indemnifies against loss and not against liability. It seems quite clear that the liability in clause D, for loss "actually sustained

and paid in money by him after actual trial of the issue," is not enlarged or changed by the stipulations in the preceding clauses; but that a compliance with its terms is made a condition precedent to any right of action on the policy. In short, the policy is one of indemnity against loss actually sustained and paid in money by the assured, without regard to who assumes the defense. In clause B the appellant reserved the privilege and assumed the obligation of defending claims for damages covered by the policy. But this does not imply that, in the event the defense is unsuccessful, it will pay the judgment. The question of payment is provided for in clause D.

This is the interpretation we put upon a similar policy in *Puget Sound Imp. Co. v. Frankfort etc. Ins. Co.*, 52 Wash. 124, 100 Pac. 190, and *Sheard v. United States Fid. etc. Co.*, 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276. The same construction has been given to like policies in other jurisdictions. *Finley v. United States Casualty Co.*, 113 Tenn. 592, 83 S. W. 2; *Frye v. Bath Gas & Elec. Co.*, 97 Me. 241, 54 Atl. 395, 94 Am. St. 500, 59 L. R. A. 444; *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981; *Clark v. Bonsal & Co.*, 157 N. C. 270, 72 S. E. 954; *Carter v. Aetna Life Ins. Co.*, 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155; *Cayard v. Robertson & Hobbs*, 123 Tenn. 382, 131 S. W. 864, 30 L. R. A. (N. S.) 1224; *O'Connell v. New York, N. H. & H. R. R.*, 187 Mass. 272, 72 N. E. 979; *Appel v. People's Surety Co.*, 132 N. Y. Supp. 200; *Conqueror Zinc & Lead Co. v. Aetna Life Ins. Co.*, 152 Mo. App. 322, 133 S. W. 156.

In the *Finley* case the plaintiff, an injured employee of the assured, recovered a judgment for personal injuries against his employer, and thereafter filed a bill in equity against the insurer, basing his right to recover upon two grounds; (1) that the policy of his employer inured to his benefit, and (2) that he had a right to impound the alleged debt in the hands of the insurer and subject it to his judgment, because he asserted that a compromise, which the insurer had made with the insured, was made for the fraudulent purpose of defeating the

collection of the judgment. The policy was identical in meaning with the policy in controversy. The court said, that the policy insured against loss only; that no obligation arose until the assured had paid the loss; that the policy was for the benefit of the employer and not for the benefit of his employee, and that the clauses in the policy similar to those relied upon by the respondent as fixing a liability were qualified and controlled by the clause in the policy similar to clause D in this policy.

In the *Frye* case, the intestate of an injured employee had recovered a judgment against the employer for damages for personal injuries. The defense of that suit was partially assumed by the insurer, and was conducted by its counsel in conjunction with counsel of the employer, under a clause in the contract of insurance which gave the insurer the right to defend such suits. The plaintiff thereafter filed a bill in equity against the insurer. It was held that the contract of the insurer was with the insured, to indemnify it "against loss," and that the policy was not obtained by the assured for the benefit of its employees, but for its own benefit exclusively, "to reimburse it for any sum that the company might be obliged to pay and had paid."

The *Carter* case was also prosecuted against the insurer by a bill in equity. The plaintiff, an employee of the assured, had recovered a judgment against the latter for personal injuries. The insurer had assumed control of the defense in the action in which the judgment was recovered. The court said that the contract was with the assured and not with the employee, and that the clause in the policy substantially identical with clause D "leaves no doubt of the intention of the parties, which was that the insurance company was not required to pay anything because of the policy until losses had been paid by the assured in satisfaction of a judgment." Commenting on the effect of the assumption of the defense for the assured, the court said:

"The fact that the insurance company made the defense

for the bridge company against plaintiff's claim for damages did not estop it from denying liability under its contract. The right to defend was specifically given by the contract, and this burden was assumed for the reason that the award to be made in the proceeding might ultimately be the measure of its own liability. To defend the action in behalf of the assured was in no sense an agreement to pay the plaintiff's judgment, and could not have misled the plaintiff. *Connolly v. Bolster, supra.*"

In the *Cayard, O'Connell, Appel,* and *Conqueror Zinc & Lead* cases, the company had assumed charge of the defense in the original actions, and a like conclusion was announced.

The respondent relies upon the view taken in *Sanders v. Frankfort etc. Ins. Co.*, 72 N. H. 485, 57 Atl. 655, 101 Am. St. 688. In that case the court held that the obligation of the company to "defend" suits brought against the assured and covered by the policy meant "to successfully defend," and that after final judgment payment is ordinarily the only defense. This view was criticised in *O'Connell v. Bolster, supra,* by the supreme judicial court of Massachusetts, and in *Cayard v. Robertson etc.*, by the supreme court of Tennessee, and is opposed to the great weight of authority. Moreover, it seems to us a strained construction of a contract that, in respect to the matters involved here, is entirely clear and unambiguous. The learned trial court said that he was disposed to follow the reasoning of the *Sanders* case, because it was fairer and less technical; and counsel argue that the construction there announced is in harmony with the principles of equity and justice. This depends altogether upon the point of view. The respondent has no rights in the policy, either legal or equitable. The policy was not written for his protection, but it was written for the purpose of indemnifying the insured against loss sustained and paid. Clause N does not militate against this view. The actual payment of the loss by the assured as provided in clause D is a condition precedent to the right in any one to maintain an action upon the policy.

The parol testimony is equally unavailing to the respondent. If Hancock made the promise, it is within the statute of frauds if it be treated as a promise to pay the debt of the Gerricks. On the other hand, if it be treated as a promise to pay a debt which the respondent was asserting against the appellant as he contends, there was no consideration to support it and the elements of estoppel are not present. The respondent in his first reply alleges that the Gerricks became insolvent "about the time of the entry of the judgment." This was October 29. The promise relied upon was made on December 12. The record is barren of evidence of any change in the financial condition of the Gerricks after that date. The plain implication, however, is that it did not change between those dates. The respondent's rights were in no wise affected or changed between the date of the promise and the date of suing out of the writ of garnishment. Under such circumstances, there is no estoppel established against the appellant. *Warder v. Baker*, 54 Wis. 49, 11 N. W. 342; *Sears v. Thompson*, 72 Iowa 61, 33 N. W. 364. As was well said in the *Warder* case; if the promise constituted a liability, "then the plaintiff ought to be permitted to plead in the first instance, not that the defendant owed him any debt, but that, previous to the commencement of the action, he had admitted his indebtedness, and, relying upon such admission, he brought his action to recover the same."

It is patent that, when the respondent sued out the writ and up to the time he filed his last and amended reply, he was relying upon an indebtedness due from the appellant to the Gerricks. He alleges the indebtedness in his affidavit, and in substance reasserts it in his reply to the first answer. It was only upon this theory that the statute gave him a right to the writ. Subject to exceptions not here present, the plaintiff in garnishment can get no better right to the debt garnished than his debtor has; and if the latter has no right in or to the debt, the former acquired none in the garnishment. *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac.

153, 46 Pac. 238; *Allen v. Aetna Life Ins. Co.*, 145 Fed. 881; *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596.

Moreover, the rule is well settled that the plaintiff cannot by a subsequent pleading introduce a cause of action different from that set forth in his complaint. *Clemmons v. McGeer*, 63 Wash. 446, 115 Pac. 1081. This rule means that the respondent could not sue out his writ upon the allegation that the appellant owed the Gerricks, and then recover upon the theory that it owed him. We have preferred, however, to rest the case upon the principle that the appellant's liability was to the assured only. It follows that no other can question the finality of the settlement.

The judgment is reversed, with directions to enter a judgment for the appellant.

MOUNT, PARKER, MORRIS, and CHADWICK, JJ., concur.

[No. 10173. Department One. August 27, 1912.]

FREDERIC E. ELMENDORF, *Respondent*, v. JOHN STEEL *et al.*, *Appellants*.[1]

BROKERS—CONTRACT FOR COMMISSION—PERFORMANCE—EVIDENCE—SUFFICIENCY. A broker failed to earn his commissions by securing a purchaser ready to buy on the terms authorized, which required a payment of $4,000 in cash, and the balance of $8,000 in three years, where it appears that there was an existing mortgage for $4,000, the vendor refused to take a second mortgage for the balance, or merely give a contract, and the purchaser was only willing to pay $4,000 in cash, assume the existing mortgage and give a second mortgage for the balance; and the fact that the parties tried to negotiate for additional security is immaterial if not acted upon.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered June 28, 1911, upon the verdict

[1]Reported in 126 Pac. 52.

of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Davis & Rhodes, for appellants.

Hamblen & Gilbert, for respondent.

CHADWICK, J.—This action was brought to recover a commission, alleged to be due because of the performance of the following contract:

Date: 8-19-10
Street Number: 01501-3-5-7-9 and 11 Mill
Between: Northwest Cor. Maxwell and Mill.
Lot 1, Block 21
Size of Lot 50 x 126
Mortgage: $4,000.00 Rate 7%
Expenses: Improvements
Taxes: $157.00 6- Flats 6 rooms each
Ins. $7000.00 separate furnace. $30.00 each.
Heat: Tenant
Light: "
Terms: $4000.00 cash, balance 7% three years

Price: $12,000.00
Facing: East
Additions: Strattons
When built: 2 years
Due: Any time, two years to run
Total Income: $2160.00
Rents Total exp. 273.00
Net Income 1997.00

Spokane, Wash. Aug. 19, 1910.

In consideration of Elmendorf & Elmendorf listing for sale the property described on other side of this card, I hereby give said firm the sale of said property on terms there mentioned until October 1st, 1910, and thereafter until otherwise notified, and I agree to pay said firm a commission of $500.00 when a purchaser for said property is found.

Signed: John Steel.

It is alleged that, on the 5th day of September, 1910, plaintiff produced a purchaser, ready, willing and able to buy, and that defendant refused to sell the property upon the terms set out in the contract, and that he notified plaintiff that he would not sell the property on the terms contained in the listing contract. We deem it unnecessary to notice the answer, for the reason that our decision on defendant's challenge to the evidence will be decisive of the case. From a verdict in favor of the plaintiff, defendants have appealed.

It seems that one Stanley was acting as an agent for a Mrs.

Adams, and wanted the property for her. He authorized respondent to pay $500 as earnest money. There was a second mortgage on the property, and this whole controversy seems to have arisen over the manner in which the deferred payments should be cared for. Respondent testified as follows:

"Q. And you wanted him to take a mortgage back on the house? A. No, sir. Q. You suggested that he do it? A. No, sir, he said that he would not take a second mortgage, and I told him he could give a contract if he did not want to take a second mortgage. Q. How did the question of the second mortgage arise? A. He asked how he would be secured on the property. He said, 'Do you expect me to take a second mortgage?' And I said, 'You can either take a second mortgage, or you can give a contract.' I said, 'I think that is immaterial to my customer; that is the customary way.' Q. You say, then, that he asked you if you expected him to take a mortgage back on the property, that he was selling? A. Yes, sir, a second mortgage. Q. A second mortgage? A. Yes, sir. Q. You suggested it and he refused, did he? A. He said, 'Do you expect me to take back a second mortgage?' Q. What did you say? A. I said, 'You can either take a second mortgage, or you can give a contract.' I said, 'If you want to give her a deed and get a mortgage back, you can negotiate the paper, or you can give a contract.' I said, 'I think it is immaterial to my client.' Q. And he said he would not take back a second mortgage? A. He said he would not take a mortgage. Q. Did he say he would not take a second mortgage? A. Yes, he said he would not take a second mortgage. Q. Then he asked if you could not give a first mortgage on the Broadway property? A. Yes, sir. Q. And he went over and looked at the property? A. He looked at that same property. Q. He looked at that when you were discussing a trade? A. Yes, sir. Q. Did you tell him that you could not give him a first mortgage on that property on Broadway? A. Yes, sir. Q. Then, provided he would not take a second mortgage on the property that he was selling, the only way left for him to do, if he accepted your terms, was to give a contract? A. Well, I don't know but that a deed in escrow might have done."

Mr. Stanley testified:

"Q. On what terms did you agree to purchase the property? A. I wanted to buy the property for twelve thousand dollars, four thousand dollars in cash, four thousand dollars in two years, and assume the mortgage for four thousand dollars. Q. You were prepared to give a payment of four thousand dollars? A. Yes, sir, after a proper investigation of the title."

We think it cannot be successfully claimed that these negotiations can be accepted as a performance of the contract. The listing contract called for a payment of $4,000 and the balance in three years at 7 per cent. There was an existing mortgage for $4,000, and it may have been the intention of the owner to discharge this mortgage, thus keeping the legal title under his absolute control until the balance of the purchase price was paid, or to take a mortgage back for the amount of the deferred payments, thus protecting his investment or equity in the property from the hazards of an outstanding prior encumbrance. Appellant was not bound to accept the terms offered, or any terms, unless expressed in, or fairly implied from, the written terms of the contract. The rule is:

"In order to be entitled to his commissions, a broker employed to negotiate a sale must procure a customer ready and willing to buy on the terms specified by the principal to the broker, or upon different terms where the principal himself has made the change, or has assented to or ratified any other terms the broker may have made." 4 Am. & Eng. Ency. Law (2d ed.), 974.

It is said that the reason Mr. Steel did not accept the offer made by Mr. Stanley was that he wanted the purchaser to secure the balance due him by mortgage upon property other than that covered by the contract, and that he refused only on that ground. We find the testimony insufficient to sustain this contention. It is true that some demand was made for other security, but it all occurred in the negotiations predicated upon an offer that did not comply with the listing contract. Negotiations of the parties pending a sale as to

details or as to additional security, cannot be held to be an abandonment of the contract, although they may if acted upon become evidences of a modification. If not acted or agreed upon, all differences and disputes must be resolved by reference to the original agreement. Respondent has not performed within the terms of the contract, nor did the parties agree upon another.

Reversed and remanded, with instructions to enter a judgment of dismissal.

CROW, GOSE, PARKER, and MORRIS, JJ., concur.

[No. 9770. Department One. August 28, 1912.]

DINSMORE SAWMILL COMPANY, *Respondent*, v. FALLS CITY LUMBER COMPANY, *Appellant*.[1]

EVIDENCE—PAROL MODIFICATION OF WRITTEN CONTRACT. A parol modification of a written contract must be established by clear and convincing evidence.

Appeal from a judgment of the superior court for Spokane county, A. M. Craven, Esq., judge *pro tempore*, entered February 1, 1911, upon findings in favor of the plaintiff, in an action on contract. Affirmed.

Cullen, Lee & Foster, for appellant.

Charles P. Lund, for respondent.

PER CURIAM.—The plaintiff brought this action to recover a balance alleged to be due for lumber sold and delivered to defendant in pursuance of a written contract. The contract contained the following stipulations pertinent to the inquiry:

"All lumber to be graded at the mill by a competent grader to be selected by the party of the first part [the defendant] and whose salary or wages shall be paid by the party of the

[1]Reported in 126 Pac. 72.

second part [the plaintiff] and whose grade shall be final as far as settlement is concerned as to the parties hereto and the lumber shall be received at Troy, Idaho, by a checker to be paid for by the party of the first part and whose tally shall be final as to the amount of lumber furnished by second party to the first party. The party of the second part will deliver all the lumber at Troy, Idaho, f. o. b. cars which the party of the first part shall secure, and in case the said party of the first part shall be unable to secure cars, then the said party of the second part shall deliver the lumber to the party of the second part at Troy, Idaho, when the checker shall accept the same and give a receipt for the same . . . . If the grader or checker or either of them herein mentioned shall not be satisfactory to the parties hereto, or one of them, substitutions will be made to the satisfaction of the parties hereto."

The defense interposed was, (1) that, after the execution of the written contract, it was agreed between the parties that all the lumber manufactured at the plaintiff's mills should be graded at Troy, Idaho, instead of at the mill as stipulated in the contract; and (2) that, after a portion of the material delivered at Troy had been graded by graders selected by the defendant, the parties to the contract became mutually dissatisfied with the grading; that they then agreed that it should be regraded by a Mr. Owens, and that all material thereafter delivered at that point should be graded by him; that his grading should be accepted as final by both parties to the contract; and that, according to his grading, the defendant had overpaid the plaintiff a sum stated, for which judgment was demanded. At the trial the defendant offered evidence tending to show a parol modification of the terms of the contract in the respects mentioned, and tending to show that, according to the grade of Mr. Owens, a large part of the lumber delivered at Troy was not "sound merchantable lumber," as required by the contract, and tending to show an indebtedness in its favor. The court found the issues in favor of the plaintiff, and a judgment was entered accordingly. The defendant has appealed.

A detailed discussion of the evidence would serve no useful purpose. The testimony is conflicting in respect to the merchantability of the lumber and the parol modifications of the contract. The court found that the lumber was all graded by a grader selected by the appellant, and checked and receipted for by its checker as stipulated in the contract. This settled the two questions of the quantity and the merchantability of the lumber.

When a party to a written contract seeks to prove a subsequent parol modification of its terms, the evidence of such a modification must be clear and convincing. *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931; *Barnes v. Packwood*, 10 Wash. 50, 38 Pac. 857. The appellant has wholly failed to sustain this burden. Indeed, a reading of the evidence has convinced us that it preponderates in favor of the court's findings.

The judgment is affirmed.

[No. 10483. Department One. August 28, 1912.]

J. T. BUFFINGTON *et al.*, *Respondents*, v. S. A. HENTON *et al.*, *Appellants*.[1]

CONTRACTS—CONSTRUCTION—BREACH. Under a contract whereby the plaintiffs agreed to dig a well at a specified price per foot and the defendants to furnish the necessary casing the plaintiffs are entitled to the agreed compensation if the defendants, within a reasonable time after demand, refused to furnish the casing reasonably necessary for the prosecution of the work.

TRIAL—PROVINCE OF COURT AND JURY—CONSTRUCTION OF CONTRACT—VERDICT. Where the only dispute between parties to a written contract for digging a well was as to who breached the contract, resulting in a discontinuance of the work, and the jury found that the defendant was in default, the court may, upon a general verdict for the plaintiff, enter judgment for the proper amount, where it was a mere matter of computation.

[1]Reported in 126 Pac. 58.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered June 17, 1911, upon the verdict of a jury rendered in favor of the defendants, in an action on contract. Affirmed.

J. M. Dunn, for appellants.

G. T. Mogan, for respondents.

Gose, J.—On the 1st day of September, 1910, the plaintiffs and the defendant husband entered into the following written contract:

"Sunnyside, Washington, 9-1, 1919.

"This contract and agreement entered into between A. S. Henton, party of the first part, and J. T. Buffington & Son, parties of the second part.

"The parties of the second part agree to drill a 5 3-8 inch well for consideration of $2.75 per ft. for the first 100 feet.; $3 per ft. from 100 to 150 ft. and $3.25 from 150 to 200 ft. The parties of the second part agree to furnish all fuel, board and move the machinery.

"The party of the first part to furnish all casing and to pay $300 cash when well is accepted, and to give note for balance, payable in six (6) months from date of completion.

"(Signed) J. T. Buffington & Son.

"S. A. Henton.

This action was brought to recover an alleged balance due, of $225.75 and interest. It is alleged in the complaint that, on the 21st day of November, 1910, when the well had been drilled to a depth of 181 feet, sand was encountered, and that it became necessary to have casing for the well, in order to prevent caving and to enable the plaintiffs to continue drilling; that the defendants refused to furnish the casing, and directed the plaintiffs to discontinue the drilling, and that they did so. It is further alleged that the defendants paid the $300 cash stipulated in the contract, and that they refused to give the promissory note for the balance due as provided therein. The defendants denied that it became necessary to have casing, denied that they refused to furnish it, denied that they directed the plaintiffs to discontinue

drilling, admitted that they paid the $300 and that they refused to give the note, but did not deny that the well had been drilled to a depth of 181 feet. When upon the witness stand, the defendant husband admitted that the well was drilled to a depth of 181 feet, but stated that, at that time, June, 1911, it had caved in to the extent of thirty feet. The court instructed the jury that if "pursuant to said contract the plaintiffs entered upon the performance thereof and drilled a well 5 5-8" in diameter to a depth of 181 feet, and that upon reaching said depth of 181 feet the defendants either failed to furnish casing to go to a further depth upon demand being made for same by plaintiffs, and the lapse of a reasonable time within which to furnish it after such a demand, if any, if you shall find by a fair preponderance of the evidence that casing was necessary to drill any deeper, or that upon reaching said depth the defendants or either of them requested the plaintiffs to cease drilling; and if you further find that the defendants have failed to pay for said drilling at the contract price, or refuse to give a note for the balance due over the sum of $300, then your verdict will be for the plaintiffs." The defendants requested the following instruction, which the court refused:

"If you believe from the evidence that the defendants requested plaintiffs to stop drilling at 181 feet as alleged in the complaint, and that plaintiffs thereupon ceased work pursuant to said request; and if you find that the well was not then completed and finished according to the contract, and that other work was necessary before the well could be finished, according to the contract, such as pulling out the casing theretofore driven in the well, and rimming out said well through the rock so as to allow the casing to be driven down to the bottom of the well; and if you find from the evidence that the well required casing below the rock, then and under such findings and conditions plaintiffs cannot recover the full contract price, but only such part or portion thereof as the evidence shows would compensate plaintiffs for work done up to the time the work was stopped."

The verdict reads: "We, the jury in the above entitled cause, do find for the plaintiffs." A judgment was entered upon the verdict for the amount claimed. The defendants prosecute the appeal.

The court correctly interpreted the contract in the instruction given, and was clearly right in refusing the requested instruction. The contract defines the respective duties of the parties and fixes the rate of compensation. It was the duty of the appellants to furnish "all casing" reasonably necessary for the prosecution of the work, within a reasonable time after a demand therefor. If they failed to do so, they breached the contract and the respondents were entitled to the agreed compensation. They were entitled to the same compensation if they discontinued the work at the request of the appellants. The contract imposes no duty upon the respondents, either express or implied, other than drilling in the event the appellants failed or refused to furnish such casing as was reasonably necessary for the prosecution of the work.

It is said that the court erred in entering a judgment upon the verdict. We think not. There was but one question of fact for the jury to determine, viz., who breached the contract. This fact was found in favor of the respondents. There being no issue upon the depth of the drilling, the contract fixed the measure of the appellant's liability, and the court could have instructed the jury, as a matter of law that, if they found that the appellants failed to furnish the casing within a reasonable time after demand and that the casing was reasonably necessary for the further prosecution of the work, or if they found that the appellants directed the respondents to discontinue drilling, they should return a verdict for the respondents for the amount later entered in the judgment. The duty of construing the contract devolved upon the court and the amount of the judgment, after the jury found the default of the appellants, was a mere matter of computation. *Phillips v. Behn & Foster*, 19 Ga. 298;

Jackson v. Jackson, 47 Ga. 99; *Logan County Nat. Bank v. Townsend*, 8 Ky. Law 694, 3 S. W. 122; *Jones v. King*, 30 Minn. 368; *English v. Goodman*, 3 N. D. 129; *Redmond v. Weismann*, 77 Cal. 423; *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78; *Hodgkins v. Mead*, 119 N. Y. 166, 23 N. E. 559.

The judgment is affirmed.

CROW, PARKER, and CHADWICK, JJ., concur.

[No. 10477. Department One. August 29, 1912.]

SPOKANE & EASTERN TRUST COMPANY, *Appellant*, v. SPOKANE COUNTY *et al.*, *Respondents*.[1]

TAXATION — CONSTITUTIONAL REQUIREMENT — UNIFORMITY — BANK STOCK — "PROPERTY TAX." The assessment of bank stock for the purposes of general taxation, under Rem. & Bal. Code, § 9134, requiring it to be assessed to the owners thereof at its full and fair value in money, is a property and not an excise tax, and hence is subject to the constitutional requirement that taxes be uniform and equal (overruling *Pacific Nat. Bank v. Pierce County*, 20 Wash. 675, 56 Pac. 936, and *Ridpath v. Spokane County*, 23 Wash. 436, 63 Pac. 261).

SAME — UNIFORMITY — ARBITRARINESS — RELIEF — EQUITY. Const., art. 7, § 2, requiring a uniform and equal rate of assessment and taxation of property, is violated by the assessment of bank stock at 60 per cent of its value, when all other personal property is intentionally, and in pursuance of a fixed and definite policy, assessed at less than forty per cent of its value; and being arbitrary and a constructive fraud upon the rights of the property holder discriminated against, equity will grant relief.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 15, 1912, upon sustaining demurrers to the complaint, dismissing an action to enjoin the collection of a tax. Reversed.

H. M. Stephens, for appellant.

A. M. Craven, *John L. Wiley*, *O. J. Saville*, and *Bruce Blake*, for respondents.

[1]Reported in 126 Pac. 54.

Gose, J.—This is an appeal from a judgment sustaining demurrers to the complaint and dismissing the action upon the plaintiff's declining to amend. In brief, it is alleged, that the appellant is a domestic banking and trust corporation; that it had paid its annual license fee last due; that the county of Spokane and the city of Spokane are municipal corporations; that the defendants Stewart and Stone are respectively the county treasurer and sheriff of the county; that the capital stock of the appellant is $300,000, divided into three thousand shares of the par value of $100 each; that it was listed and purported to be assessed as required by the code, Rem. & Bal. Code, § 9134; that the respondents, in pursuance of a definite settled policy and design, intentionally adopted and practiced for a number of years, valued and assessed all property, real, personal and mixed, other than bank stock, upon the 1st day of March, 1910, at not to exceed 37.42 per cent of its real, actual cash value, and that they at the same time assessed the stock of the appellant at sixty per cent of its real, actual cash value; that the appellant appeared before the board of equalization at its regular session in 1910, and protested against the assessment and the discrimination, but that its objections were arbitrarily overruled and its petition for an equalization denied, and that it had tendered to the respondent treasurer the full amount of taxes which it should pay, measured by the policy adopted and accorded to all other classes of property. It is further alleged:

"That it is the practice and custom all over the state of Washington to assess property at less than the actual value, and to assess it upon some per cent of its value, and that per cent is usually from thirty to forty per cent. That property in the county of Spokane, state of Washington, other than the capital stock of banks, is assessed at not exceeding 37.42 per cent of the actual value thereof, and bank stock is assessed at a much higher and greater per cent of the actual value thereof, to wit, sixty (60) per cent."

The demurrers were rested and sustained upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The appellant contends that the assessment complained of is arbitrary, fraudulent, and violative of § 2, art. 7, of the constitution. The respondents contend that a tax upon the shares of stock in a banking corporation is an excise tax, and that the rule of uniformity and equality commanded by the constitution is complied with if all property of the class upon which the excise rate is levied is assessed at the same rate.

We will first consider the respondents' contention. In *Pacific Nat. Bank v. Pierce County*, 20 Wash. 675, 56 Pac. 936, and *Ridpath v. Spokane County*, 23 Wash. 436, 63 Pac. 261, it was held that a tax upon the shares of the capital stock of a banking corporation was an excise tax. However, the principle announced in later cases is not in harmony with that view. *Citizens' Nat. Bank v. Columbia County*, 23 Wash. 441, 63 Pac. 209; *Ladd v. Gilson*, 26 Wash. 79, 66 Pac. 126; *Jefferson County v. First Nat. Bank*, 38 Wash. 255, 80 Pac. 449. In the *Jefferson County* case it was sought to foreclose a delinquency tax certificate against the real estate of the bank. The bank had paid one-half of its real estate tax before it became delinquent, and had made a timely tender of the remainder. The board of equalization had made an assessment of $13,000 against the bank upon its capital stock, and had sought to make the tax thereon a lien upon the bank's real estate, and a delinquency tax certificate had issued to the county therefor. In meeting the argument that no injury had resulted to the stockholders from assessing the stock to the bank instead of the stockholder, the court said:

"But we do not see our way clear to sustain a tax upon bank stock which has been assessed against the bank, when the law specifically says it shall be assessed to the several owners of the stock. Even though the result of sustaining the tax might lead indirectly to payment by the owners, still their

rights are prejudiced when the assessment is not made to them individually, and their indebtedness respectively deducted therefrom."

The logic of that decision is that the tax is a property tax and not an excise tax. An excise tax is a tax upon a pursuit, trade, or occupation, and generally takes the form of an exaction for a license fee to pursue the particular occupation. 3 Words and Phrases, 2548. Where the charge is imposed solely or primarily as a means of raising revenue, it is a property tax. 37 Cyc. 711; 21 Am. & Eng. Ency. Law (2d ed.), 775; 3 Thompson, Corporations, § 2817; 2 Cook, Corporations, §§ 561-563; *Miller v. First Nat. Bank*, 46 Ohio St. 424, 21 N. E. 860; *First Nat. Bank v. Fisher*, 45 Kan. 726, 26 Pac. 482; *Bank of California v. San Francisco*, 142 Cal. 276, 75 Pac. 832, 100 Am. St. 130, 64 L. R. A. 918.

In the *Fisher* case it was said that a tax upon the shares of stock in a bank "is a several tax upon the shares of each individual stockholder or shareholder as distinguished from a lumping tax or a tax '*in solido*' upon the bank itself." The capital stock of a corporation is corporate property. The shares in it are the individual property of its stockholders. It is the latter that may be taxed in this state. Rem. & Bal. Code, § 9134. This statute enacts that all the shares of stock in banks located within the state shall be assessed to the owners thereof "at their full and fair value in money," after deducting the proportionate part of the assessed value of the real estate belonging to the bank. The intention to make the assessment a property tax could not be more clearly expressed. The primary purpose of the tax is to raise revenue. We think that *Pacific Nat. Bank v. Pierce County*, and *Ridpath v. Spokane*, in so far as they construe a tax upon bank shares under the existing statutes to be an excise, fail to correctly interpret the statutes, and that they are not reconcilable with the basic principles in the later decisions to which we have referred, and they are therefore overruled.

Section 2, art. 7, of the constitution commands that

"The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property."

As was said in *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707: "It is just as imperative that taxation shall be uniform and equal upon all property as it is that all property shall be taxed." There is neither uniformity nor equality where all kinds of property save one are, intentionally and in pursuance of a fixed and definite policy, assessed at less than forty per cent of its full and fair value, whilst that class of property is intentionally assessed at sixty per cent of such value. The facts pleaded do not show an erroneous valuation or a difference in judgment as to a correct measure of value, but rather an intentional and arbitrary discrimination against a particular class of property. Such an arbitrary policy is vicious in principle, violative of the constitution, and operates as a constructive fraud upon the rights of the property holder discriminated against. In such cases equity will grant relief. *Andrews v. King County*, 1 Wash. 46, 23 Pac. 409, 22 Am. St. 136; *Case v. San Juan County*, 59 Wash. 222, 109 Pac. 809; *Doty Lumber & Shingle Co. v. Lewis County*, 60 Wash. 428, 111 Pac. 562, Ann. Cas. 1912 B 870; *State ex rel. Oregon R. & Nav. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7; *Savage v. Pierce County*, 68 Wash. 623, 123 Pac. 1088; *First Nat. Bank v. Christensen* (Utah), 118 Pac. 778.

The judgment is reversed, with directions to permit respondents to plead further if they so desire.

CHADWICK, PARKER, CROW, and ELLIS, JJ., concur.

[No. 10227. Department One. August 29, 1912.]

THOMAS & COMPANY, *Appellant*, v. WHITMAN A. HILLIS *et al.*, *Respondents*[1]

NEW TRIAL—INSUFFICIENCY OF EVIDENCE—DISCRETION—ABUSE. Where a new trial was granted because the evidence was insufficient to sustain a verdict for the defendant, and the order was affirmed on appeal, upon a retrial of the same case upon substantially the same evidence, which was conflicting, it is an abuse of discretion to set aside a verdict for the plaintiff as not sustained by the evidence.

BILLS AND NOTES—CONSIDERATION—EXTENSION OF TIME. An extension of time for the first payment to become due on a contract for the purchase of land, is a sufficient consideration for a promissory note for the amount of the payment.

Appeal from an order of the superior court for King county, Main, J., entered January 8, 1912, granting a new trial for insufficiency of the evidence, after the verdict of a jury rendered in favor of the plaintiff, in an action on a promissory note. Reversed.

Hamlin & Meier, for appellant.

Earle & Steinert and *Peters & Powell*, for respondents.

CHADWICK, J.—A brief statement of the history of this case is necessary. At the first trial, Honorable Wilson R. Gay presiding, a verdict was returned in favor of the defendants. A motion for a new trial was interposed by the plaintiff, and was granted by the court upon the ground that the evidence was insufficient to sustain the verdict. On appeal, the order granting a new trial was affirmed (*Thomas & Co. v. Hillis*, 64 Wash. 288, 116 Pac. 854, to which reference may be had for a statement of the facts). Upon remand, the case came on for trial before the Honorable John F. Main, and the jury returned a verdict in favor of the plaintiff. Whereupon defendants filed a motion for a new trial. This motion was

[1]Reported in 126 Pac. 62.

sustained "upon the ground and for the reason of the insufficiency of the evidence to justify the verdict, and because the verdict is against the evidence and the law." From this order, the present appeal is taken.

The judgment of the lower court is justified by defendants by reference to the rule that we will not interfere with the discretion of the trial judge in granting a new trial for insufficiency of evidence to sustain the verdict, unless it is made to appear that there has been a clear abuse of discretion. The cases sustaining this principle are collected in the case of *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88; *McGraw v. Manhattan Co.*, 66 Wash. 388, 119 Pac. 822, and *Taylor v. Spokane, Portland & Seattle R. Co.*, 67 Wash. 96, 120 Pac. 889. It is also contended that the verdict is contrary to the law.

Addressing ourselves to the first ground relied upon to sustain the judgment, the only question is whether, admitting the rule just referred to, the present order granting a new trial was, considering the history of this case, an abuse of discretion. It seems to us that it is so. The order was not made upon the ground of surprise or newly discovered evidence, but upon the same ground that moved the court to grant a new trial after the first verdict; that is, insufficiency of the evidence to sustain the verdict. The effect of the first order and its affirmation by this court was that, in the judgment of the court, the evidence was insufficient to sustain a verdict for defendants, but was sufficient to sustain a verdict for the plaintiff. Now, upon a retrial in the same court upon substantially the same evidence and it being conflicting, a verdict for the plaintiff was returned. It would seem that there should be a time when the question of the insufficiency of the evidence to sustain a verdict is foreclosed.

While the rule is that, "in the absence of statutory prohibition, it seems that there is no limit to the number of new trials which may be granted in a cause upon proper grounds," it is only applied generally when errors of law are complained

of, for the text just quoted (14 Ency. Plead. & Prac., pp. 992, 993), continues: "But a distinction is made where the judge disagrees with the jury on questions of fact." While it is true that a different judge presided at the last trial, in theory and within the intendment of the law the trial occurred in the same court. This rule must apply. Otherwise, if a retrial occurred before a different judge, the law of the case as determined by the appellate court would never be settled. In holding that the discretion of a trial judge, when exercised in the matter of granting a new trial on the ground of insufficiency of the evidence to sustain the verdict, will not be reviewed unless an abuse of discretion be made to appear, we have said no more than this; that we will not overrule the judgment of the trial judge if by proper reference to the statement of facts it is clear that there is a conflict of evidence. If the court finds that there is, although in its judgment the weight may be against the holding of the trial judge, it will not control his discretion. But, where a case comes to this court after a second trial, it would seem that a more positive duty is put upon us; that is, to ascertain from the whole record whether it is more probable that the court is correct in its holding than is the verdict of the jury. Now, there being a substantial conflict in the testimony, and being unable to say that the verdict of the jury is not sustained by a preponderance of the evidence, we are of opinion that it should prevail.

The trial judge found also that the verdict was contrary to the evidence and against the law. While this finding is embodied in the judgment, it can hardly be asserted with any show of reason that the judgment was contrary to the evidence; for, if the court found as a fact indeed that the verdict was contrary to the evidence, he would have granted defendants' motion for judgment *non obstante*. We take it, therefore, that the trial judge based his order solely on the ground that, in his judgment, the testimony of the plaintiff was insufficient to sustain the verdict. The judgment, in

form at least, says that the verdict was contrary to the law, and defendants contend that the following instruction:

"You are further instructed that if you find from the evidence that the note in suit was signed some days before the contract was signed and that the note was made and delivered for the purpose of securing an extension of time from the irrigation company on the first payment, which was, under the memorandum agreement, to be paid before the final contract should be prepared, and that by reason of the delivery of said note, the desired extension was secured and that the defendant Hillis signed the note and authorized its delivery prior to any promise to make the contract satisfactory, and solely upon the promise contained in the memorandum agreement to prepare the contract in duplicate upon the irrigation company's regular printed form embodying the terms of sale, together with its regular water agreement, then the said note was not secured or delivered without consideration, if it were delivered, and would under those circumstances be a valid obligation;"

is erroneous, and is in itself sufficient to sustain the order granting a new trial. To sustain defendants' contention, we would have to say with them that there was no evidence in the case on which to base such an instruction. As indicated above, we are unable to say this, for the testimony is not altogether one way, but, upon the very point covered by the instruction, is conflicting and uncertain.

Nor is the suggestion available that it is immaterial whether the note was given before or after the contract was signed (defendant W. A. Hillis is himself uncertain), or whether the note was signed conditionally, for the reason that the purchase price was entire and the tract of lands to be conveyed was entire, and that there could be no consideration for the note other than or different from the consideration for the payment of the balance for the entire tract. The memorandum contract, which fixed the time and terms of payment, made the first payment due February 1, and we believe the law to be—at any rate, it is the legal effect of our former decision—that an extension of the time from February 1 to March 1

is a sufficient consideration to support the promise. The evidence being conflicting, and it being held by one judge and one jury that its weight is with the plaintiff, and another judge and a jury having held that weight to be with the defendants, there must be evidence to sustain a verdict one way or the other, and there being no error of law to compel a new trial, we are of opinion that it was an abuse of discretion on the part of the trial judge to set aside a verdict rendered upon a second trial upon the ground of insufficiency of the evidence.

The judgment of the lower court is reversed, with directions to enter judgment upon the verdict of the jury.

CROW, GOSE, and PARKER, JJ., concur.

[No. 10243. Department One. August 30, 1912.]

A. E. GRANT, *Respondent*, v. H. L. LILIENTHAL, *Appellant*.[1]

CONTRACTS—PERFORMANCE—EVIDENCE—SUFFICIENCY. Findings that a subcontractor completed his grading contract are sustained by evidence that the assistant city engineer set stakes to indicate the final line of the grade, that the contractor graded to the line marked, and that the work was finished with such grading.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 17, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Burcham & Blair, for appellant.

Cullen & Lee, for respondent.

MORRIS, J.—Action to recover balance claimed to be due under a subcontract to do certain work connected with the grading of a street. Appellant obtained a contract from the city of Spokane to grade, curb, and lay sidewalks along what

[1]Reported in 125 Pac. 1009.

is known as Syringa road. He sublet a part of this contract to respondent, and the difference between them is as to what work was included in this subcontract. The court below found in favor of respondent and sustained his contention.

The contract between the parties hereto reads: "all of the grading necessary for the grading of Syringa road from the center line of Highland boulevard to the center line of Overbluff." The prices for the work to be done are also given as: "Solid rock excavation, one dollar per cubic yard; loose rock excavation, fifty-five cents per cubic yard; earth excavation, thirty cents per cubic yard; excavating for curbs, eight cents per lineal foot." Contending that he had completed his contract, respondent ceased work, and not obtaining what he claims to be due him, he brought this action.

Appellant contends that, subsequent to respondent's leaving the work, he was compelled, under his contract with the city, to do the following work at a cost of $535.28, which work was properly included within respondent's contract and should have been done by him: Filling up the portion of the parking strip between the sidewalk and the curb; filling in back of sidewalk; raking off the larger stones; crowning the street. Here we have a plain question of fact as to whether or not respondent completed all the work called for by his contract. Some of the witnesses, competent to determine the meaning of the technical expressions used in the contract and the amount and character of work called for, say he did; others, equally competent, so far as we can observe from the record, say he did not. We are inclined, after reading the evidence, to agree with the lower court that its weight and preponderance are with respondent.

The assistant city engineer in charge of the work testified that he set stakes, with blue chalk marks on them, to indicate to the grading contractor the final line of the grade. The evidence shows that respondent graded up to the blue chalk marks. Other evidence is to the effect that these blue chalk marks, placed on stakes driven at each side and in the

center of the roadway, indicated to the contractor the finish line of his work, and when the grade is as indicated by the blue chalk marks it is finished. This testimony is ample to sustain the findings, and they will be sustained.

Judgment affirmed.

Fullerton, Parker, Chadwick, and Gose, JJ., concur.

[No. 10301. Department One. August 31, 1912.]

John M. Boyle, *as Administrator etc., et al., Appellants*, v. Narrows Land Company, *Respondent*.[1]

Vendor and Purchaser—Contracts—Construction—Repayment of Purchase Price—Death of Purchaser. A provision in a land contract for the repayment, in case the purchaser dies, of all sums paid on the purchase price, provided payment of all installments have been made promptly on or before the date thereof, is intended to secure prompt payment of installments, and being distinct from the stipulation that a sixty-day default should entitle the vendor to claim a forfeiture, a repayment of purchase money can be enforced only on condition that all payments had been made when due, and payments made within the sixty days of grace are unavailing.

Same—Waiver—Election. In such a case, payments by an administratrix, representing the heirs at law, constitute an election to proceed with the performance of the contract, and preclude recovery of payments made.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered December 19, 1911, upon sustaining a demurrer to the complaint, dismissing an action on contract, after a trial before the court. Affirmed.

Boyle, Warburton & Brockway, for appellants.

E. R. York, for respondent.

Crow, J.—This action was commenced by John M. Boyle, as administrator of the estate of Clifton J. Griffith, deceased, and by Delia Griffith, against Narrows Land Company, a cor-

[1]Reported in 126 Pac. 78.

poration, to recover payments of purchase money made on two contracts of sale of real estate. The trial court sustained a demurrer to the amended complaint. The plaintiffs refused to plead further, and have appealed from the final judgment of dismissal.

The amended complaint in substance alleges that, on August 13, 1907, and April 16, 1908, the Narrows Land Company, as vendor, and Clifton J. Griffith, now deceased, as vendee, executed two separate written contracts for the sale of various lots and blocks of platted ground in "Regents Park," Pierce county, Washington. The only material variance in the two contracts appears in their dates, the tracts sold, and the payments to be made. It is therefore necessary to state the terms of one only. The contract of August 13, 1907, provided for the sale of five lots in block 37, "Regents Park," for $2,750, payable $125 cash, and $31.25 on or before the 13th day of each and every month thereafter. The sale was made subject to certain building conditions not material to the present inquiry. The land was to be conveyed upon full payment, and time was made the essence of the contract as to all of its stipulations. The only provisions of the contract material on this appeal read as follows:

"In the event that said party of the second part [the vendee] shall make default in any of the payments hereinbefore provided for at the time the same become due and such default continues for sixty (60) days thereafter, then, and in that event the party of the first part shall be relieved from all obligations under this agreement, and shall be under no obligation or liability to convey said real property, or any part thereof, and the money theretofore paid by said party of the second part shall be retained by said party of the first part as a consideration for the execution of this agreement, and as a consideration for the right to possession of said real property, which right of possession is hereby granted to said party of the second part to continue so long as payments are made as provided in this contract. . . . .

"In the event of the death of the second party [the vendee]

while this agreement is in force and unassigned, the legal representatives of said second party may continue payments thereon; or the first party will, on request and on surrender of this agreement, provided payment of all installments herein agreed to be paid and then due, have been made promptly on or before the date thereof, pay to the legal representatives of said second party an amount equal to the sum of all monthly installments paid hereon with interest at 6 per cent per annum, from date of payment on the amounts therefor paid from time to time."

The amended complaint alleges that Clifton J. Griffith, the vendee, died intestate at his home in the state of Illinois on January 26, 1910, leaving certain property in the state of Washington; that the contracts had not been assigned; that on June 3, 1911, the plaintiff John M. Boyle was appointed administrator of his estate by the superior court in and for Pierce county, Washington; and that on June 12, 1910, letters of administration were issued to him; that the appellant Delia Griffith is the widow and one of the heirs at law of Clifton J. Griffith, deceased, and that Charles J. Griffith, Samantha J. Prather, Fanny Griffith and Lilly Griffith Fawcett, brothers and sisters of the deceased, are his remaining heirs at law; that Delia Griffith, then residing in Illinois, was appointed and qualified by the probate court of Sangamon county, in that state, as administratrix of the estate of Clifton J. Griffith, deceased; that immediately after her appointment, she and her attorney made the following written demand upon respondent:

"Springfield, Ill. Feb. 4th, 1910.

"Narrows Land Co.,

"Tacoma, Wash. Clifton J. Griffith had two contracts with you, one under date of August 13th, 1907, for the purchase of lots 52, 53, 54, 55 and 56, block 37, Regent's Park, filed of record July 16th, 1907, in the office of the auditor, and the other, which is not before me, under date of August 16th, 1907, as I am informed for the purchase of ten other lots, and as he died very suddenly on 26th ult., his widow, who will administer on the estate, requests me as her attorney

to inform you that she desires to exercise her right under said contracts, and requests you to pay her an amount equal to a sum of all monthly installments paid on said contract with interest at six per cent per annum, from date of payment on the amounts paid from time to time.

"Please advise me of the amount due her from you on contracts so that I can send contracts and letter of instructions to some bank in Tacoma to deliver to you upon payment of amounts stated in letter I will write to said bank. Please answer.

"Timothy McGrath.
"Delia O'Connor Griffith
"Administrator of the estate of Clifton J. Griffith, deceased."

That respondent refused repayment of the purchase money so demanded, or any portion thereof, insisting that it was under no obligation to make repayment, as all payments on the contracts had not been made promptly at the dates in the contracts stipulated; that after such refusal, Delia Griffith, solely to prevent respondent from claiming any default in payments, and for the protection of herself, the heirs at law, and legal representatives of the deceased, continued to make all payments which, under the terms of the contracts, would have become due and payable up to the 12th day of July, 1911, inclusive, had Clifton J. Griffith survived; that the appellant John M. Boyle, as administrator of the estate of Clifton J. Griffith, deceased, pursuant to an order of the superior court in and for Pierce county, and pursuant to the terms of the agreements, demanded from respondent the money paid by Clifton J. Griffith during his lifetime, together with six per cent interest thereon, and offered to surrender the written contracts; that Delia Griffith joined in such demand; that she, on July 7, 1910, also demanded from respondent the money paid by her after the death of Clifton J. Griffith, with six per cent interest thereon, and that respondent refused to pay the same or any part thereof. The contract of April 16, 1908, called for the purchase price of $7,825, payable $1,442.50 at the date of its execution, and

the remainder in equal installments of $87.50 on the 16th of each and every month thereafter. Attached to the amended complaint and made a part thereof are itemized statements showing that, on the contract of August 13, 1907, the decedent had paid $1,000 and that Delia Griffith had paid $652.52 after his death, and showing that, on the contract of April 16, 1908, the decedent had paid $3,092.50, and Delia Griffith had paid $1,485 after his death. The administrator demanded judgment for the payments made by Clifton J. Griffith, while Delia Griffith demanded judgment for the payments made by her after the death of Clifton J. Griffith. No question is made as to misjoinder of actions.

The only question presented is whether the amended complaint states a cause of action. To determine this requires a construction of the contracts of sale. From the exhibits attached to the amended complaint it appears that the last payment made by Clifton J. Griffith was made on January 1, 1910, in satisfaction of installments that fell due on December 13, 1909, and December 16, 1909, respectively; that many of the previous payments had been made after maturity but prior to a default of sixty days, and that at the date of his death, he was in default for one installment on each contract.

The evident purpose and intention of the second provision of the contract above quoted, relating to repayment in the event of the death of the vendee, was to make it an object for the purchaser to promptly pay each installment on or before the date of its maturity, thus assuring promptness and avoiding any default. This provision was available to the heirs and legal representatives of the deceased only on condition that all payments had been made, and that none should be past due at the date of the vendee's death. The agreement that time should be of the essence of the contract applied to this stipulation as well as to all others. The privilege granted did not constitute any part of the purchase price, but, as heretofore suggested, was intended as an inducement

to prompt payment of all installments. It was a distinct stipulation, separate and apart from the other provisions that a sixty-day default in any payment should entitle the vendor to claim the forfeiture of the contract itself and all purchase money theretofore paid. The contract, by its plain terms, permitted a default in payments to continue for sixty days without subjecting the vendee to a forfeiture, but there is no connection, either by implication or express reference, between that stipulation and the provision for refunding all payments in the event of the death of the vendee. The fact that no sixty-day default existed at the date of Clifton J. Griffith's death, and that the contract could not have been then forfeited by the vendor, can be of no avail to appellants in this action, as it will not entitle them to a repayment of the purchase money. The contract, in effect, stipulated that repayment should be made only on condition that "payment of all installments herein to be paid and then due have been made promptly on or before the date thereof." The expressions "then due" and "the date thereof" relate to the date of the death of the vendee. The plain reading of this provision of the contract is that the right to repayment should exist at the date of the vendee's death, on the sole condition that all payments then due had been promptly made. If they had not been then made, the right to claim a repayment did not exist, and could not be thereafter created by any subsequent payment of defaulted installments, even though made within sixty days after maturity.

It further appears from the amended complaint that, after respondent refused to repay the purchase money, Delia Griffith elected to proceed with the payments on both contracts in accordance with their terms for more than a year, and that she made at least one payment on each contract after the appellant John M. Boyle had been appointed administrator in this state. She, as the Illinois administratrix, represented herself and the heirs at law. None of the latter have taken any exception to her action. There can be no question

but that she made an election to proceed with the performance of the contracts instead of standing upon her rights and insisting upon repayment after respondent had refused, if, as she contends, she and the other heirs were then entitled to repayment. Having made this election, she cannot now claim that she made additional payments to protect her rights and those of the heirs at law, and insist upon a repayment of the purchase money under the second stipulation of the contract above quoted.

The demurrer was properly sustained. The judgment is affirmed.

PARKER, GOSE, and CHADWICK, JJ., concur.

[No. 10170. Department One. September 3, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. PETER FEILEN, *Appellant*.[1]

CRIMINAL LAW—APPEAL—SENTENCE—PARTIAL VALIDITY. The fact that cruel punishment is inflicted does not warrant the reversal of a conviction, since the conviction would be affirmed with directions to enforce the legal part of the sentence.

CRIMINAL LAW—"CRUEL PUNISHMENT"—DISCRETION OF LEGISLATURE. The operation of vasectomy for the prevention of procreation, authorized by Rem. & Bal. Code, § 2287, cannot be judicially determined to be cruel punishment, in violation of Const., art. 1, § 14, where the sentence required it to be carefully and skillfully performed and there was no showing that it was attended with any marked degree of physical torture, suffering or pain; the rule being that the discretion of the legislature in fixing penalties will not be disturbed except in extreme cases.

Appeal from a judgment of the superior court for King county, Main, J., entered September 30, 1911, upon a trial and conviction of rape. Affirmed.

[1]Reported in 126 Pac. 75.

Sidney J. Williams and *William R. Bell*, for appellant.

John F. Murphy, *Hugh M. Caldwell*, and *H. B. Butler*, for respondent.

Crow, J.—The defendant was convicted of the crime of statutory rape, committed upon the person of a female child under the age of ten years, and was sentenced to imprisonment for life in the state penitentiary. The final judgment and sentence from which he has appealed further ordered, adjudged and decreed that:

"An operation to be performed upon said Peter Feilen for the prevention of procreation, and the warden of the penitentiary of the state of Washington is hereby directed to have this order carried into effect at the said penitentiary by some qualified and capable surgeon by the operation known as vasectomy; said operation to be carefully and scientifically performed."

By his first assignment, appellant contends that the trial judge erred in submitting the case to the jury, for the reasons (1) that no degree of penetration was shown, and (2) that the testimony of his victim, the prosecuting witness, was not corroborated by such other evidence as tended to convict him of the crime charged. We find no merit in these contentions. The evidence will not be discussed or stated in this opinion, as no good purpose could be thereby served. We are convinced that, under the rule announced in *State v. Kincaid*, 69 Wash. 273, 124 Pac. 684, the evidence was sufficient to comply with the requirements of Rem. & Bal. Code, § 2437. We are also satisfied that the evidence afforded that degree and character of corroboration required by § 2155, Rem. & Bal.; and from all of the evidence we conclude that the only verdict that should have been returned was the one that the jury did return. The case was for the jury, and their verdict will not be disturbed.

Appellant was prosecuted under Rem. & Bal. Code, § 2486,

and the penalty of life imprisonment was properly imposed. Rem. & Bal. Code, § 2287, provides that:

"Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be an habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation."

It was under the authority of this section that the trial judge ordered the operation of vasectomy, and appellant, by his remaining assignments, contends that it is unconstitutional in that an operation for the prevention of procreation is a cruel punishment prohibited by art. 1, § 14 of the state constitution, which directs that "excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." As the statute does not prescribe any particular operation for the prevention of procreation, the trial judge ordered that the operation known as vasectomy be carefully and skilfully performed. The question then presented for our consideration is whether the operation of vasectomy, carefully and skilfully performed, must be judicially declared a cruel punishment forbidden by the constitution. No showing has been made to the effect that it will in fact subject appellant to any marked degree of physical torture, suffering or pain. That question was doubtless considered and passed upon by the legislature when it enacted the statute. Appellant further contends that the imposition of the alleged cruel punishment as a part of the sentence necessitates a reversal of the judgment. This would not be true, even though we were to hold the operation to be an infliction of cruel punishment, as the judgment of conviction would have to be affirmed with directions to enforce the penalty of life imprisonment. When a sentence is legal in one part and illegal in another, it is not open to controversy that the illegal, if separable, may be disregarded and the legal enforced. *United*

States v. Pridgeon, 153 U. S. 48; *State v. Williams*, 77 Mo. 310, 313.

The crime of which appellant has been convicted is brutal, heinous, and revolting, and one for which, if the legislature so determined, the death penalty might be inflicted without infringement of any constitutional inhibition. It is a crime for which, in some jurisdictions, the death penalty has been imposed. 33 Cyc. 1518. If for such a crime death would not be held a cruel punishment, then certainly any penalty less than death, devoid of physical torture, might also be inflicted. In the matter of penalties for criminal offenses, the rule is that the discretion of the legislature will not be disturbed by the courts except in extreme cases.

"It would be an interference with matters left by the constitution to the legislative department of the government, for us to undertake to weigh the propriety of this or that penalty fixed by the legislature for specific offenses. So long as they do not provide cruel and unusual punishments, such as disgraced the civilization of former ages, and make one shudder with horror to read of them, as drawing, quartering, burning, etc., the constitution does not put any limit upon legislative discretion." *Whitten v. State*, 47 Ga. 297.

On the theory that modern scientific investigation shows that idiocy, insanity, imbecility, and criminality are congential and hereditary, the legislatures of California, Connecticut, Indiana, Iowa, New Jersey and perhaps other states, in the exercise of the police power, have enacted laws providing for the sterilization of idiots, insane, imbeciles, and habitual criminals. In the enforcement of these statutes, vasectomy seems to be a common operation. Dr. Clark Bell, in an article on hereditary criminality and the asexualization of criminals, found at page 134, vol. 27, Medico-Legal Journal, quotes with approval the following language from an article contributed to Pearson's Magazine for November, 1909, by Warren W. Foster, senior judge of the court of general sessions of the peace of the county of New York:

"Vasectomy is known to the medical profession as 'an office operation' painlessly performed in a few minutes, under an anaesthetic (cocaine) through a skin cut half an inch long, and entailing no wound infection, no confinement to bed. 'It is less serious than the extraction of a tooth,' to quote from Dr. William D. Belfield, of Chicago, one of the pioneers in the movement for the sterilization of criminals by vasectomy, an opinion that finds ample corroboration among practitioners. . . There appears to be a wonderful unanimity of favoring opinion as to the advisability of the sterilization of criminals and the prevention of their further propagation. The Journal of the American Medical Association recommends it, as does the Chicago Physicians' Club, the Southern District Medical Society, and the Chicago Society of Social Hygiene. The Chicago Evening Post, speaking of the Indiana law, says that it is one of the most important reforms before the people, that 'rarely has a big thing come with so little fanfare of trumpets.' The Chicago Tribune says that 'the sterilization of defectives and habitual criminals is a measure of social economy. The sterilization of convicts by vasectomy was actually performed for the first time in this country, so far as is known, in October, 1899, by Dr. H. C. Sharp, of Indianapolis, then physician to the Indiana State Reformatory at Jeffersonville, though the value of the operation for healing purposes had long been known. He continued to perform this operation with the consent of the convict (not by legislative authority) for some years. Influential physicians heard of his work, and were so favorably impressed with it that they endorsed the movement, which resulted in the passage of the law now upon the Indiana statute books. Dr. Sharp has this to say of this method of relief to society: 'Vasectomy consists of ligating and resecting a small portion of the vas deferens. This operation is indeed very simple and easy to perform; I do it without administering an anaesthetic, either general or local. It requires about three minutes' time to perform the operation and the subject returns to his work immediately, suffers no inconvenience, and is in no way impaired for his pursuit of life, liberty, and happiness, but is effectively sterilized.' "

Must the operation of vasectomy, thus approved by eminent scientific and legal writers, be necessarily held a cruel punishment under our constitutional restriction when applied

to one guilty of the crime of which appellant has been convicted? Cruel punishments, in contemplation of constitutional restrictions, have been repeatedly discussed and defined, although we have not been cited to, nor have we been able to find, any case in which the operation of vasectomy has been discussed. In *State v. Woodward*, 68 W. Va. 66, 69 S. E. 385, a recent and well-considered case which may be consulted with much profit, Brannon, Justice, said:

"The legislature is clothed with power well nigh unlimited to define crimes and fix their punishments. So its enactments do not deprive of life, liberty or property without due process of law and the judgment of a man's peers, its will is absolute. It can take life, it can take liberty, it can take property, for crime. 'The legislatures of the different states have the inherent power to prohibit and punish any act as a crime, provided they do not violate the restrictions of the state and federal constitutions; and the courts cannot look further into the propriety of a penal statute than to ascertain whether the legislature had the power to enact it.' 12 Cyc. 186. 'The power of the legislature to impose fines and penalties for a violation of its statutory requirements is coeval with government.' *Mo. P. R. Co. v. Humes*, 115 U. S. 512. The legislature is ordinarily the judge of the expediency of creating new crimes, and of prescribing penalties, whether light or severe. *Commonwealth v. Murphy*, 165 Mass. 66, *Southern Express Co. v. Commonwealth*, 92 Va. 66. For such a fundamental proposition I need cite no further authority. . . . What is meant by the provision against cruel and unusual punishment? It is hard to say definitely. Here is something prohibited, and in order to say what this is we must revert to the past to ascertain what is the evil to be remedied. Within the pale of due process the legislature has power to define crimes and fix punishments, great though they may be, limited only by the provision that they shall not be cruel or unusual or disproportionate to the character of the offense. Going back to ascertain what was intended by this constitutional provision the history of the law tells us of the terrible punishment visited by the ancient law upon convict criminals. In our days of advanced Christianity and civilization this review is most interesting, yet shocking and heartrending."

The learned jurist then proceeds with the narration of the cruel punishments mentioned in 4 Blackstone, at pages 92, 327, and 377, and after citing and discussing the English Bill of Rights; *Whitten v. State*, 47 Ga. 301; *Aldridge Case*, 2 Va. Cases, 447; *Wyatt's Case*, 6 Rand. 694; *In re Kemmler*, 136 U. S. 436, 446; *Wilkerson v. Utah*, 99 U. S. 130, 135; Cooley, Const. Lim. (4th ed.), 408; Wharton, Crim. Law (7th ed.), § 3405; *Hobbs v. State*, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774; *State v. Williams*, 77 Mo. 310; *Weems v. United States*, 217 U. S. 349; *O'Neil v. Vermont*, 144 U. S. 323, and other cases, says:

"In short, the text writers and cases say that the clause is aimed at those ancient punishments, those horrible, inhuman, barbarous inflictions."

In *In re O'Shea*, 11 Cal. App. 568, 105 Pac. 777, the California court of appeals for the first district said:

"Cruel and unusual punishments are punishments of a barbarous character and unknown to the common law. The word, when it first found place in the Bill of Rights, meant not a fine or imprisonment, or both, but such punishment as that inflicted by the whipping post, the pillory, burning at the stake, breaking on the wheel, and the like; or quartering the culprit, cutting off his nose, ears or limbs, or strangling him to death. It was such severe, cruel, and unusual punishments as disgraced the civilization of former ages, and made one shudder with horror to read of them. Cooley on Constitutional Limitations (7th ed.), p. 471 *et seq; State v. McCauley*, 15 Cal. 429; *Whitten v. State*, 133 Ind. 404, 32 N. E. 1019; *State v. Williams*, 77 Mo. 310. The legislature is ordinarily the judge of the expediency of creating new crimes, and prescribing the punishment, whether light or severe. *Commonwealth v. Murphy*, 165 Mass. 66, 42 N. E. 504, 52 Am. St. Rep. 496, 30 L. R. A. 734; *Southern Express Co. v. Com.*, 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436."

Guided by the rule that, in the matter of penalties for criminal offenses, the courts will not disturb the discretion of the legislature save in extreme cases, we cannot hold that vasectomy is such a cruel punishment as cannot be inflicted

upon appellant for the horrible and brutal crime of which he has been convicted.

The judgment is affirmed.

PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 10354. Department Two. September 3, 1912.]

ROBERT TSCHIRLEY, *by His Guardian etc., Respondent*, v. E. V. LAMBERT, *Appellant*.

PAUL TSCHIRLEY *et al., Respondents*, v. E. V. LAMBERT, *Appellant*.[1]

HIGHWAYS—COLLISION—AUTOMOBILE AND BICYCLE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. The negligence of the driver of an automobile in colliding with the plaintiff riding a bicycle, and the contributory negligence of the plaintiff, are questions for the jury, where it appears that, after each had observed the other, several hundred feet away, the plaintiff, without watching, crossed the road ahead of the automobile approaching at the rate of 15 or 20 miles an hour, and was clear of the roadway when struck, and that, with plaintiff in full view, the automobile approached with undiminished speed without warning or signal and left the road where it collided with the plaintiff, probably because the driver "got rattled," and the collision would not have happened if the automobile had kept its course in the road.

Appeal from judgments of the superior court for Spokane county, Hinkle, J., entered November 11, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in consolidated actions for personal injuries sustained through a collision with an automobile. Affirmed.

Graves, Kizer & Graves, for appellant.

Laughon & Lavin, for respondents.

MORRIS, J.—These two actions were consolidated in the lower court for the purpose of trial, and as they both grow out of the same facts and present the same question on appeal

[1]Reported in 126 Pac. 80.

and are to be reviewed on the same statement of facts, they will be so treated here, although separate judgments have been entered, from which separate appeals have been taken.

Robert Tschirley is a minor, eighteen years of age. The other plaintiffs are his parents. The actions were brought to recover damages for injuries sustained by the minor plaintiff in a collision with appellant's automobile. No error is claimed upon the admission or rejection of testimony, or in the giving or refusal of instructions to the jury; the only error urged being the denial of appellant's motions for judgment notwithstanding the verdicts against him.

This presents but one question: Is the contributory negligence of the minor respondent so clearly established as to make it the duty of this court, as a matter of law, to set aside the verdicts? To which may be added the further inquiry, Is there sufficient evidence of the appellant's negligence to support the verdict? In addition to the general verdict, ten special interrogatories were presented to the jury, which, together with the record, establish this state of facts: The accident happened on Sunday evening, at about 6:30 o'clock, of May 29, 1910, at a place known as Vera, some distance east of Spokane. The highway is sixty feet wide, and is known as Sprague avenue. At a point on this avenue near where it is intersected by a lane or roadway, is a country store. At about the store, Sprague avenue divides into two roadways, one proceeding along the north line of the avenue, the other along the south line. Extending along the south roadway, and from ten to twelve feet from it, were loosely piled stones, the piles being about two feet high at the center and about two or three feet in width. Among these stones, telephone poles were erected at about the usual distance apart. Between these two traveled roadways, the ground was rough and uneven, so that travelers driving vehicles of any description would take one or the other of the roadways.

As the appellant, driving his automobile, approached the intersection of these two roadways from the east, driving at

from fifteen to twenty miles an hour, he observed and was observed by the minor plaintiff (whom we will hereafter refer to as respondent), who was watching some of his friends who were playing ball along the north roadway at about the point of the store, respondent being stationed some twenty feet west of the store. The automobile, when first seen by respondent, was about three hundred feet east of the store, and was observed by him as he mounted his bicycle to go after the ball, which had been batted in a southwesterly direction across the avenue and beyond the piled-up stones. Appellant, on arriving at the intersection of these two roadways, took the south roadway and continued along that roadway at undiminished speed until he collided with respondent, a distance of four hundred and forty-five feet from the point where he was first observed by respondent and one hundred and twenty-five feet west of the point where respondent first observed him.

A witness named Herboth, who is commended by both parties for his intelligent and manifestly impartial story of the accident and its surroundings, says he was in his house when he was attracted to the door by the noise of the automobile running over these loosely piled stones. The automobile, when he first saw it, was running on top of the piled stones at a point he estimates as fifty or sixty feet west of where the collision occurred. As he came to the point of collision, he could plainly see the tracks of both machines. The automobile tracks turned off from the beaten track and swerved to the south and west thirty or forty feet from the point of collision, ran up on top of the piled-up stones, and then turned again into the roadway. The front wheel of the bicycle, at the time of the collision, was within two feet of the stone pile and from six to eight feet south of the roadway, when the left front wheel of the automobile struck the rear wheel of the bicycle, dragging respondent beneath the auto we estimate a distance of about seventy-five feet. The witness says he stepped off the distance and found it twenty-four

or five steps at three feet to the step, the auto running one hundred and eighty steps or five hundred and forty feet before it came to a stop.

We think the foregoing is a correct and impartial statement of all the facts contributing to the accident. It seems to us they present only questions of fact. We cannot say, in the light of the verdict, that the appellant was not negligent in driving his car along the devious route as shown by its tracks, having at all times the respondent in plain view, and having ample time and distance in which to so drive his car as to avoid hitting the respondent. Nor can we say that, because the respondent did not look at the auto from the time when he first saw it until the collision took place, he was guilty of such contributory negligence as to preclude his recovery. He might have anticipated appellant would proceed along the north roadway, which would be the natural course in taking the right-hand track. Or he might have believed that, in case appellant took the south or left roadway towards which he was propelling his bicycle, the horn or other warning signal of danger would be given in time for him to protect himself. The boy was clear of the roadway at the time of the collision. No accident would have occurred had appellant kept on his course in the traveled way. That he did not do so is undoubtedly explainable by his own statement at the time, that he "got rattled." Assuming he did so, it is not such a case as contended by his counsel where one acting in a sudden and unexpected emergency makes a wrong move or does the wrong thing, which under certain circumstances might excuse what otherwise would be negligence. We cannot escape the conclusion that we have here only a plain question of fact, the answer to which, in the absence of error in its submission, must be found in the verdict of the jury.

Judgment affirmed.

Mount, Fullerton, Ellis, and Crow, JJ., concur.

[No. 10412. Department Two. September 3, 1912.]

DEWITT C. RICHARDSON, *Respondent*, v. BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant*.[1]

APPEAL — REVIEW — HARMLESS ERROR — PLEADINGS — AMENDMENTS. Where the case was tried on the merits to the court with fully opportunity to each party to present the evidence, error cannot be assigned on technical objections to the pleadings, which will be considered as amended.

BENEFICIAL ASSOCIATIONS — FORFEITURE OF MEMBERSHIP — REINSTATEMENT — ESTOPPEL — ACCEPTANCE OF DUES. A foreign beneficial association is estopped to assert that a member was not reinstated and had forfeited his rights, where, after a default, he regularly applied for reinstatement, was informed by the local lodge that he was reinstated, and subsequently paid all dues, which were forwarded to and retained by the society, credited on the local lodge's general account, leaving the member as standing suspended without notice to him; since the local lodge was the representative of the society.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered October 10, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon a beneficiary certificate. Affirmed.

H. L. Dickson and *Barnes & Pearson*, for appellant.

D. R. Glasgow and *Cannon, Ferris & Swan*, for respondent.

FULLERTON, J.—The appellant is a fraternal beneficiary society operating on the lodge system. The respondent became a member of one of the appellant's local lodges, known as Sprague Lodge No. 133, located at Spokane, and on October 8, 1909, took out a beneficiary certificate in the appellant lodge, entitling him to share in the lodge's beneficiary fund to the extent of $1,500 in case he received certain enumerated physical injuries or bodily ailments while a member

[1]Reported in 126 Pac. 82.

thereof in good standing. On November 2, 1910, the respondent met with a serious physical injury of a nature entitling him to share in the beneficiary fund to the amount of his certificates, and in due season presented his claim to the appellant therefor. The claim was disallowed, whereupon the present action was brought to recover the amount claimed to be due. After issue joined, the action was tried by the court sitting without a jury, and resulted in findings and a judgment in favor of the respondent for the full amount claimed. This appeal is from the judgment so entered.

The appellant makes some question as to the sufficiency of the pleadings, contending specially that the reply contained both a denial of the defendant's answer and an affirmative allegation in confession and avoidance thereof not separately stated. But even if the objection was technically well taken when interposed in the court below, it is of but little moment as the case now stands. The case was tried in the court below on its merits, and each of the parties was given the same opportunity to introduce evidence in support of his cause of action or defense as he would have been given had the pleadings been technically perfect. No prejudice therefore resulted to either party by reason of the defect complained of, and it is not the policy of the law nor the practice of the courts to retry causes for the mere purpose of correcting nonprejudicial errors. Moreover, this court is required by statute to disregard any error in the proceedings or defect in the pleadings which does not affect a substantial right of the adverse party, and to determine all causes upon the merits thereof, disregarding all technicalities, and to consider all amendments which could have been made as made. Rem. & Bal. Code, §§ 307, 1752. This statute requires us to disregard defects such as are here complained of, and such has been our practice. *Green v. Tidball*, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879; *Richardson v. Moore*, 30 Wash. 406, 71 Pac. 18; *Irby v. Phillips*, 40 Wash. 618, 82 Pac.

931; *Hester v. Stine*, 46 Wash. 469, 90 Pac. 594; *Peterson v. Barry*, 50 Wash. 361, 97 Pac. 239; *State ex rel. Merriam v. Superior Court*, 55 Wash. 64, 104 Pac. 148.

On the merits of the controversy it is contended that the evidence fails to support the judgment. It appears that the respondent failed to pay his assessments for the month of July, 1910, and was suspended because thereof. That subsequently he applied through the local lodge in the usual manner for reinstatement, and from thence on until the time of his injury paid regularly into his local lodge the assessments as they were levied, being told shortly after making his application that he had been reinstated. It seems, however, that he was not in fact reinstated by the appellant lodge; that while that body retained the sums remitted to it by the local lodge as dues from the respondent, it refused to credit them on such dues, but credited them to the local lodge's general account, returning the appellant as standing suspended. No information was given the respondent of this condition of the matter until after he received his injury. On the contrary, he was, prior to that time, led to believe by the local lodge that he was at all times a member of the appellant society in good standing, and was entitled to share in case of injury in its beneficiary fund to the amount of his certificate; his monthly dues to the local lodge being paid on the strength of that belief.

The respondent contended, and the trial judge held, that the appellant was estopped by reason of the foregoing facts from denying the respondent's membership, and was liable to him on his certificate in the same manner it would have been liable had he appeared regularly upon its list of insured. The learned trial judge based his decision upon the case of *Shultice v. Modern Woodmen of America*, 67 Wash. 65, 120 Pac. 531, and notwithstanding the appellant seeks to distinguish the case from the case at bar, we think it fully supports his ruling. That case was rested on the principle

that officers of local camps and lodges authorized to receive from its members assessments levied on beneficiary insurance certificates were agents of the society granting the insurance and not that of the members, notwithstanding declarations to the contrary in the rules and by-laws of the society. In the course of the opinion it was said:

"This instruction presents the principal question in the case. The appellant contends that the question of the agency of the clerk of the local camp is settled by the contract. On the other hand, the respondent contends that the question of agency is one of law to be determined from all the facts and circumstances in the case; in other words, to be determined from the actual, rather than the fictitious, relations of the parties. We think the instruction correctly states the law. The appellant, as we have seen, is a foreign corporation. It can only act through its local camps. The clerk of the local camp is the officer who collects, receipts for, and transmits the assessments. The appellant has no other fund from which to pay its death losses, and no other means of collecting assessments. A corporation can act only through its officers and agents. This court has consistently and steadfastly adhered to the view that it will not permit an insurance company, whether it be an old line company or a fraternal organization, to change the fundamental law of agency by contract, and thus exonerate itself from liability for the acts of those who are in fact and law its agents. *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, 32 Pac. 458, 34 Am. St. 877; *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86; *Foster v. Pioneer Mut. Ins. Ass'n.*, 37 Wash. 288, 79 Pac. 798; *Hall v. Union Cent. Life Ins. Co.*, 23 Wash. 610, 63 Pac. 505, 83 Am. St. 844, 51 L. R. A. 288; *Staats v. Pioneer Ins. Assn.*, 55 Wash. 51, 104 Pac. 185; *Hoeland v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 Pac. 866; *Schuster v. Knights & Ladies of Security*, 60 Wash. 42, 110 Pac. 680, 140 Am. St. 905."

The principle as thus announced fully supports the judgment of the trial court, and as we are satisfied with the rule, it is needless to pursue the inquiry further. The judgment is affirmed.

MOUNT, ELLIS, and CROW, JJ., concur.

[No. 10391. Department Two. September 3, 1912.]

HALLIDIE COMPANY, *Respondent*, v. WASHINGTON BRICK, LIME & MANUFACTURING COMPANY *et al.*, *Appellants*.[1]

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS—SUFFICIENCY. General exceptions to findings of fact, stated to the judge at the time of filing the findings, noted by the judge at the foot of the findings specifying the findings excepted to by number, are sufficient to obtain a review of the findings; and in the absence of any showing to the contrary, it will be presumed that the notation of the exceptions was made by the judge.

SAME—NECESSITY OF EXCEPTIONS. Exceptions to the conclusions of law or to the judgment are not necessary to obtain a review of the findings and judgment.

COURTS—DECISIONS—STARE DECISIS. A settled construction of statutes respecting practice will not be departed from unless the gravest necessity exists therefor.

SALES—BREACH OF GUARANTY—DAMAGES—DEFENSES. The purchaser of a guaranteed engine and boiler cannot offset against the price losses incurred in its business while attempting to use it with a boiler capacity that was insufficient to generate sufficient steam to operate the engine to its guaranteed capacity, where the manufacturer was not responsible for the insufficient boiler capacity; nor where the same was accepted after remedying the defect by increasing the boiler capacity, and it was not shown that the losses were suffered solely by the failure of the vendor to furnish an engine complying with the guaranty within the time fixed by the contract.

APPEAL—REVIEW—FINDINGS—PLEADING AND PROOF. A finding that a corporation purchasing a business of another assumed all obligations incurred in the business cannot be predicated alone on allegations that were denied, there being no evidence on the subject.

COSTS—ON APPEAL—PARTIAL REVERSAL. On reversing a judgment as to one defendant and affirming as to another, where there was no segregation of the appeals, plaintiff will recover one-half of its costs, and pay to the successful defendant one-half of the appellant's costs.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered November 2, 1911, upon findings in favor of the plaintiff, after a trial on the merits

[1]Reported in 126 Pac. 96.

before the court without a jury, in an action on contract. Affirmed in part and reversed in part.

Charles P. Lund, for appellants.
Graves, Kizer & Graves, for respondent.

FULLERTON, J.—On October 22, 1908, the Hallidie Machinery Company entered into an agreement in writing with the Washington Brick, Lime and Manufacturing Company, by the terms of which it agreed to sell and deliver to the manufacturing company a 72x18 high pressure Eric City boiler and a 14x30 rolling mill type Corliss engine, with certain enumerated fixtures, for a consideration of $4,840.62. By the terms of the sale the seller guaranteed that the engine, when running at a speed of 110 revolutions per minute at about one quarter cut off, under a steam pressure of 150 pounds, would develop 252 indicated horse power. The machinery was furnished and installed as agreed upon, and the purchaser made payments on the purchase price thereof aggregating $2,090.90. The manufacturing company was engaged in the manufacture of brick and had extensive machinery for that purpose which the boiler and engine were intended to operate, but it was found, after ample trial, that they would not develop sufficient power to operate it to its capacity, and complaint thereof was made to the seller to that effect. The manufacturing company contended that the fault lay with the engine; that it would not develop 252 indicated horse power when operated under the conditions and to the capacity set forth in the contract of sale. Experts were sent to examine the engine, and several changes were made in the feed and exhaust valves, but it was found impossible to make it operate the purchaser's brick machinery to its full capacity. The experts thereupon made tests of the engine to ascertain whether its actual capacity was equal to its rated and guaranteed capacity. These experts differed as to results. Those employed by the seller finding that it would develop an indicated horse power in excess of

the guaranteed horse power, while those employed by the purchaser were unable to make it show that amount of power. All of the experts agreed, however, that the boiler generating the steam supply was insufficient in capacity to furnish steam sufficient to operate the engine up to 252 indicated horse power; their testimony being to the effect that it requires a boiler of greater capacity than 150 horse power to serve an engine of 252 horse power.

Subsequent to the tests, further negotiations were had between the parties without result. Finally, on June 4, 1909, the seller wrote the purchaser the following letter:

"Spokane, Wash. June 4, 1909.

"Mr. Jos. H. Spear,
"Pres. and Gen. Mgr., Wash. Brick & Lime
"Mfg. Co.,
"City.

"Dear Sir: Confirming our conversation with you this morning about your Murray Corliss engine at Freeman, wish to say that we will hereby offer you the following concession, as we wish to dispose of this matter to your entire satisfaction.

"We will furnish and install, at our expense, a 15-inch diameter cylinder and piston to take the place of the 14-inch size now in use on the engine, which 14-inch cylinder is to be returned to us.

"In doing this, we wish you to clearly understand that this is a concession on our part as a matter of policy because we want your good will and future business, and future business for Murray Iron Works in this territory, and this change is not made because the engine will not deliver the horse-power named in the contract. The engine which we furnished you will unquestionably deliver the contract power under proper conditions, and in furnishing you a 15-inch cylinder we are giving you a reserve of power beyond that contracted for.

"Trusting that this will close this matter satisfactorily to you, we are

"Very truly yours,
"Hallidie Machinery Company,
"B. B. Truett, Local Manager."

To this letter, the purchaser replied as follows:

"Spokane, Wash., June 5th, 1909.

"Mr. B. B. Truett, Local Manager,
"Hallidie Machinery Co.,
"Spokane, Wash.

"Dear Sir: Replying to your favor of the 4th inst, we note your proposition to install at your expense a 15-inch diameter cylinder and piston to take the place of the 14-inch size now in use on the engine at Freeman. Recalling the terms of your contract, we do not think this is a question for us to pass upon. Under the terms of the contract you have the right to make good, if possible, anything that may be wrong with the engine, and it was for this purpose that we advised you after starting the machinery that the engine was not meeting the conditions of your contract. We have waited patiently something over three months for you to ascertain and correct whatever the trouble might be so as to deliver to use the power that your contract covered. If the 15-inch diameter cylinder and piston which you propose to put in will do this, it is satisfactory to us, but we are not willing to name in advance that the placing of a 15-inch cylinder will be satisfactory to us. We want to see the results of same, and we do not waive any of our rights under the contract. We have waited very patiently for ninety days, and have been working under great difficulties, with a lessened output and a high fuel expense in order to operate and fill the contracts as nearly as possible that we had assumed.

"Anything that you do to remedy the evils now existing in connection with this engine, we would like you to do as quickly as possible, and if after these changes are made the engine will give us the 250 h. p. named in your contract on an economical fuel basis, we will be pleased to accept same, but I am not an expert, and I do not wish in advance to commit myself or waive any of the rights that this company may have in connection with the contract made with you for supplying this power.

"Yours respectfully,
"Washington Brick, Lime & Mfg. Co.
"By Jos. H. Spear."

Subsequently the seller installed a new cylinder in the engine—making it at the request of the purchaser a 16-inch diameter cylinder instead of a 15-inch—which on the installation by the purchaser of an increased boiler capacity, operated to the purchaser's satisfaction.

This action was brought to recover the balance unpaid on the contract price of the engine and boiler. The plaintiff alleged that, subsequent to the sale of the boiler and engine, the Hallidie Machinery Company transferred and assigned to the plaintiff its business, good will and all of its assets, which included the account against the purchaser of the boiler and engine. It alleged further that, subsequent to entering into the contract, the defendant Washington Brick, Lime & Sewer Pipe Company purchased the business, good will and all of the assets of the defendant Washington Brick, Lime & Manufacturing Company, and assumed and agreed to pay all of the indebtedness of the latter company, including the indebtedness due on account of the purchase of the boiler and engine in question. The defendants filed separate answers. The Washington Brick, Lime & Sewer Pipe Company admitted that it had purchased the business, assets and good will of the Washington Brick, Lime & Manufacturing Company subsequent to the time that the contract sued upon had been entered into, but denied each and every other allegation of the complaint.

The Washington Brick, Lime & Manufacturing Company admitted the allegations of the complaint to the effect that the plaintiff was the successor in interest of the Hallidie Machinery Company and the owner of the account sued upon; also, that it had sold and transferred to its codefendant, Washington Brick, Lime & Sewer Pipe Company, its business, good will, and assets, but denied that the latter company had assumed or agreed to pay any of its obligations. For an affirmative defense, set-off and counterclaim, it alleged a breach of the contract of sale entered into between itself and the Hallidie Machinery Company; it alleged that

the engine furnished it under the contract of sale was not of the power guaranteed by the seller, and because thereof it had been unable to operate its brick machinery to the capacity it would have been able to operate it had the engine been of the power guaranteed; that because it could not operate its brick machinery to its full capacity, it had been unable to fulfill the contracts it had actually entered into for supplying brick, and had been unable to enter into other similar contracts offered it, to its loss and damage in a sum in an excess of the balance unpaid upon the cost price of the engine and boiler.

The action was tried by the court sitting without a jury. The court found that there remained unpaid on account of the sale of the machinery described the sum of $2,750.42. It found also that, subsequent to the sale, the defendant Washington Brick, Lime & Sewer Pipe Company purchased the bulk of the business, the good will and assets of the defendant Washington Brick, Lime & Manufacturing Company, including the goods, wares, and merchandise sold to its codefendant by the plaintiff's predecessor in interest, and that it assumed the indebtedness and liabilities incurred thereby by such codefendant. It also found that the boiler by which the engine purchased was attempted to be operated was insufficient in capacity for that purpose, "that in order to operate said engine under a continuous pressure of one hundred and fifty pounds at the throttle and develop therein two hundred and fifty-two indicated horse power with a speed of one hundred ten revolutions at about one-fourth cut-off, it would be necessary to have a boiler large enough to furnish approximately seventy-five hundred pounds of steam per hour, and that the capacity of one hundred and fifty horse power boiler under normal conditions is approximately fifty one hundred seventy-five pounds of steam per hour." It also found that the proposal contained in the letter of the seller to the purchaser, the acceptance of the conditions thereof by the purchaser, and the subsequent in-

stallation pursuant thereto of a new cylinder by the seller, operated to estop the purchaser from contending that there had been a breach of the contract of sale. The court refused, however, to find on the question whether the engine would develop under the conditions defined in the contract of sale the indicated horse power therein guaranteed, reciting in its written findings that the evidence was not sufficiently clear to enable it to make a finding in that behalf, reciting further that such a finding was unnecessary in view of the finding concerning the estoppel. Judgment was entered against both of the defendants for the sum demanded in the complaint. This appeal followed.

The respondent contends that the judgment appealed from is not subject to review in this court because of the insufficiency of the exceptions taken to the findings and judgment. The exceptions were noted at the foot of the written findings, and recite that the defendants and each of them except to certain of the findings which are specified by their numbers. The statute prescribes two methods of taking exceptions. One is by stating to the judge at the time the findings are signed the exceptions desired to be taken, and the other is by filing written exceptions to the findings within five days after the filing of the same. If the exceptions are taken at the time the findings are made, it is provided that the "judge . . . shall note the exceptions in the margin or at the foot of the report or decision." The objection to the present exception is two-fold. It is said that they were not taken in the form prescribed by the statute, and if properly taken are too general. It does not appear from the record by whom the exceptions were noted at the foot of the findings. But the presumption is in favor of regularity, and in the absence of a showing to the contrary, it will be presumed that the notation was made by the judge or by his order and direction, when such a presumption is necessary to sustain the validity of the exception. Allowing this presumption, the exceptions are sufficiently regular. The ques-

tion of their generality is determined contrary to the respondent's contention in the case of *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255. In that case we said:

"Respondent has moved to dismiss this appeal, for the reason that appellant has entered his exceptions to each one of the findings of fact, saying that he excepts to the specified finding for the reason that the same is not supported by the evidence and is contrary to the law. It is said that these are general exceptions, and that they come within the rule of that line of cases beginning with *Hannegan v. Roth*, 12 Wash. 65, 40 Pac. 636, holding that a general exception is insufficient, and that the court will not, under such circumstances, inquire beyond the sufficiency of the findings of fact to sustain the decree. We do not agree with counsel. It has never been the purpose or the policy of the court to hold anything other than that exceptions should be in such form as to indicate to the court the errors relied upon on appeal. An exception may not be taken if directed to all of the findings, but it may be in the same form and directed to a particular finding and meet the requirement of the rule. If the rule were not so, it would be incumbent upon us to define a form for exceptions, and clearly this would be beyond the proper function of this court."

It is also objected that there are no exceptions to the conclusions of law or to the judgment. It is conceded that this court has heretofore held that such exceptions are unnecessary in order to obtain a review of the findings and judgment, but it is argued that the holding is contrary to the statute. But whether this holding is so contrary or not we do not feel at liberty to now inquire. The proper construction of the statute is at least debatable, and to put a different construction upon it from that heretofore prevailing would not only operate injuriously upon the present appellants who have relied upon our former holdings, but also upon other litigants who have likewise relied thereon. Radical changes in the practice respecting appeals operate less injuriously to parties litigant when made by the legislature than when made by the court, and we feel that a settled con-

struction of such a statute ought not be departed from unless the gravest necessity exists therefor. No such necessity exists in this instance.

On the merits of the controversy we think the findings of the court are in the main correct. In the first place, it seems clear that, under the circumstances shown here, the appellant who purchased the engine and boiler cannot charge its losses, caused by want of sufficient motive power to operate its machinery, to the vendor of the engine, even conceding the engine to have been defective. As we have elsewhere said, it was the testimony of all of the experts, both those called by the appellant as well as those called by the respondent, that a boiler of the power of one here used would not generate sufficient steam to operate to its full capacity an engine capable of producing 252 indicated horse power, and they are all likewise agreed that this particular boiler would not generate sufficient steam to operate this particular engine to its full capacity. The appellant's losses were, therefore, caused in part at least for want of sufficient boiler capacity, and since this was not the fault of the respondent, it cannot be held for such losses; not for the whole, because it was not the cause of the whole of such losses, nor for the part, because there is no measure by which the part can be determined. In the second place, it seems equally clear that the appellant obligated itself to pay for the engine when it accepted it after it had been repaired by changing the cylinder. Had it suffered losses caused solely by the failure of the vendor to furnish the engine complying with the guaranty within the time fixed in the contract, it could, of course, offset these losses against the purchase price, but it has failed to prove that the losses suffered by it were thus caused, and hence the court committed no error in rendering judgment against it for the purchase price without deducting the losses.

But we think the court in error in holding that the corporation purchasing the business, good will, and assets of

the obligated corporation is also liable. No evidence was offered by either party concerning this sale. All that appears in the record is contained in the pleadings. As these stand, there is clearly nothing to show an assumption by the purchasing corporation of the debts of the selling corporation, either in fact or by operation of law. There is merely an allegation on the one side and a denial on the other that such an assumption was made. This is insufficient upon which to base an affirmative finding that the fact exists.

The judgment appealed from is reversed and remanded as to the defendant Washington Brick, Lime & Sewer Pipe Company with instructions to dismiss the action as to it. In all other respects it will stand affirmed. The successful appellant, since there was no segregation of the appeals, will recover one-half of the costs expended by both appellants in perfecting the appeal. The respondent will recover of the unsuccessful appellant one-half of its costs expended on this appeal. Costs in the court below will be apportioned by the trial judge.

MOUNT, MORRIS, ELLIS, and CROW, JJ., concur.

[No. 10119. Department Two. September 4, 1912.]

ANDREW STONE, *Respondent*, v. CHRIS T. SYLLIAASEN *et al.*, *Appellants*.[1]

MASTER AND SERVANT—SAFE PLACE AND METHOD OF WORK—EVIDENCE—EXPERT OPINION—ADMISSIBILITY. Where a servant, assisting in removing false work, was not acquainted with the method of work or instructed how to do it, other than to hold one end of a plank while a fellow servant lossened the other end, and was injured when the fellow servant threw his end of the plank to the floor, the opinion of experts that the method and place of work was unsafe is admissible, where there was evidence that the fellow servant did not act negligently but performed his work in the method theretofore adopted.

[1]Reported in 126 Pac. 84.

SAME—ASSUMPTION OF RISKS. In such case, the injured servant did not assume the risk of injury from such act of his fellow servant, for he was not informed that it was intended.

SAME—SAFE PLACE AND METHOD OF WORK—QUESTION FOR JURY. In such case, the negligence of the master in failing to provide a safe place or method of doing the work is for the jury.

Appeal from a judgment of the superior court for King county, Prigmore, J., entered June 10, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in the construction of a building. Affirmed.

Hughes, McMicken, Dovell & Ramsey, Otto B. Rupp, and *J. B. Joujon-Roche,* for appellants.

Jno. Mills Day and *M. E. Brewer,* for respondent.

FULLERTON, J.—The respondent, plaintiff below, recovered in this action against the appellants for personal injuries suffered by him while in the appellants' employment working as a common laborer upon a building which the appellants were erecting under contract with the owner. From the judgment entered in his favor, this appeal is prosecuted.

The building upon which the respondent was working when injured was a five-story structure, the walls of which were constructed of concrete. The joists marking the divisions between the several stories were inserted as the walls were constructed. In order to hold them in place during the construction of the walls, certain false work or shoring was used. This consisted of upright posts nearly the height of the story, placed some two feet from the wall and rested on the floor beneath, on which was placed a capping consisting of planks three by six inches in size. On top of the planks the joists were rested, being toe-nailed thereto to hold them in place. After the wall was built up to and around the ends of the joists, this shoring was removed by tearing it out. The planks capping the posts, being nailed to the joists, did not always fall away when the posts were removed, and it was

necessary to take them down by other means. One such plank, some 18 or 20 feet in length, remained attached to the joists after the posts had been removed in the room in which the respondent was working, and he was ordered by the foreman in charge of the building to assist in its removal. The respondent had not theretofore been engaged in removing the shoring, and knew nothing about the process or the dangers attending upon it, and in the particular instance simply followed the directions of the foreman. Ladders were leaned against the wall of the building near the ends of the plank it was desired to remove. The respondent was directed to ascend one of the ladders and hold that end of the plank in place while another workman loosened the other end. The respondent performed his work as directed, but the other workman, instead of holding the plank after he had loosed it from the joists, threw his end to the floor below. This act caused the end the respondent was holding to loosen and slip through his hands and the plank itself to rebound against him. In the rebound the end of the plank struck the respondent in the eye, tearing and bruising it in such a manner as to necessitate its surgical removal.

In his complaint the respondent charged the appellants with negligence in the following particulars: (1) that they failed to furnish the respondent with a safe place in which to perform the work required of him; (2) that they failed to warn him of the dangers incident to his employment; (3) that they failed to instruct the respondent's co-worker as to a manner in which he could perform his work so as not to endanger the respondent; (4) that they failed to inform the respondent as to the manner in which his co-worker had been theretofore instructed to perform similar work; (5) that they directed the respondent to perform work in a manner and in a place in which it was dangerous to perform such work, and failed to instruct him how to avoid such dangers. The respondent, answering the complaint, denied the allegations of negligence set forth therein, and alleged

affirmatively contributory negligence and assumption of risk on the part of the respondent; specially alleging that the injuries received by the respondent, if any, were caused by the negligent acts of a fellow servant of the respondent, not by the negligent acts of the appellants.

On the trial, under the issues as thus made, the court, over the objection of the appellants, permitted a contractor and builder, who qualified as an expert, to testify on behalf of the respondent that the place of work furnished the respondent by the appellants was unsafe, also that the method of taking down the timber in question adopted by the appellant was not in his opinion safe, and to state why he thought the place unsafe and what would have been a safe way to have performed the work; and in its charge to the jury the court instructed them upon the duty of the master to furnish his servant with a safe place in which to work, explaining at some length the reasons for the rule and its application to the particular case. At the conclusion of the evidence, the appellants challenged its sufficiency to make a case for the jury, and asked the court to direct the entry of a judgment in their favor.

In support of their appeal, the appellants contend that the court erred in permitting the expert witness to give his opinion as to the safety of the place of work provided by the appellants for the respondent and the safety of the method adopted by the appellants for removing the plank, and erred in charging the jury on the duty of the appellants to furnish the respondent with a safe place in which to work. If we understand the grounds of the objection, it is not contended that such evidence is never admissible, or that the charge is inherently vicious in itself, but is rather that the evidence was not admissible and the charge erroneous in the particular case for the reason that it is thought to be made clear by the testimony that the cause of the injury was the negligent act of a fellow servant, and not the unsafe place of work or the unsafe method adopted of doing the work. It

is said that the appellants' coservant, instead of holding onto his end of the plank as he should have done, negligently and carelessly threw it down upon the floor beneath him, thus causing it to rebound and strike the respondent; that he did not do this because of the insecurity of the place to work, but dropped it purposely and intentionally, and would have done so "had he stood on a step ladder, a platform or a floor itself," and that the master's duty to provide a safe place to work for his servants is not violated when the unsafety of the place provided is caused solely by the negligent acts of competent coservants in carrying out the details of the work.

But it seems to us that the appellants have here assumed, as proven, facts that are in question in the record. It was shown indirectly in the respondent's case in chief, and testified to directly by the coservant of the respondent, who was put on the stand by the appellants themselves, that the coservant did not negligently and carelessly drop the end of the plank, but, on the contrary, that he performed that part of the work as he had been led to understand he was expected to perform it, and in the manner that he had theretofore performed it. If this be true, and the jury had a right to believe it true, it is plain that there arises at once the question whether any adequate provision was made for the protection of the respondent. It will be remembered that the respondent had not, prior to this time, taken part in this particular work, that he was not acquainted with the method in which it had theretofore been carried on, and had been given no general instructions pertaining to it. The evidence is that he was only partially instructed as to his duties. He was told to hold his end of the plank while his coservant loosened the other end. He had the right, therefore, to assume that nothing further would be done than loosen the plank until he was further instructed concerning his duties, and hence assumed the risk incurred from the operation only so far as performance was directed in his presence. He did not assume the risk of injury from the throwing of the loosened

end of the plank to the floor, for he was not informed that such a thing was intended. And since the respondent did not know how the work was to be performed, he could not have known, of course, before participating therein, whether the place of work provided for him or the method of doing the work was or was not safe, and it was open to him at the time of the trial to make that contention; it was competent for him to show by expert witnesses that the manner of doing the work was dangerous in that no adequate provision was made for his safety while engaged in the performance of the work; or, in other words, that no safe place was provided him in which to perform the work. The evidence admitted and the charge of the court, as they bore directly upon the point, were not therefore objectionable. That this character of evidence is not inherently inadmissible, see *Lambert v. La Conner Trad. & Transp. Co.*, 37 Wash. 113, 79 Pac. 608; *Smith v. Dow*, 43 Wash. 407, 86 Pac. 555.

The final objection is that the evidence is not sufficient to justify the verdict, but this objection needs no further discussion. We have shown that there was sufficient evidence of the appellants' negligence to make a question for the jury, and this is as far as we have a right to inquire.

The judgment is affirmed.

MOUNT and ELLIS, JJ., concur.

[No. 10249. Department Two. September 4, 1912.]

L. L. VALENTINE *et al.*, *Appellants*, v. NORTHERN PACIFIC RAILWAY COMPANY *et al.*, *Respondents*.[1]

CARRIERS—INJURIES TO PASSENGERS—SLEEPING CARS—EVIDENCE—NONSUIT. In an action by a passenger against a railroad company and a sleeping car company for injuries sustained on a sleeping car through the negligent construction of a door and want of lights on the car, a nonsuit as to the sleeping car company is proper, where it was not alleged or shown that it sold the ticket or owned or operated the car.

SAME—DEGREE OF CARE—SLEEPING CARS. The duty of a railroad company to exercise the highest degree of care for passengers compatible with practical operation, applies to sleeping cars connected with the train, regardless of any private contract or arrangement it may have with the sleeping car company.

SAME—CARS AND APPLIANCES—NEGLIGENCE—EVIDENCE. A spring sufficiently strong to close a toilet room door on a Pullman sleeper being a necessary safeguard, in view of the swaying and lurching of the train, evidence that the spring was stronger than found on other cars, is not sufficient to establish negligence or make a case for the jury.

SAME—NEGLIGENCE—RES IPSA LOQUITUR. The doctrine of *res ipsa loquitur* does not apply to the case of an injury to a passenger by reason of the automatic closing of a spring door, when it was not shown that the door did not close when it ought not to have closed or that the spring did not perform its function.

SAME—NEGLIGENCE—LIGHTING CAR—QUESTION FOR JURY. In an action by a passenger for injuries sustained when her hand was caught by the closing of a spring door to the toilet room in a sleeping car, whether it was reasonably necessary to light the passageway or toilet room is a question for the jury, where it was a reasonable inference from the testimony that the accident would not have happened if lights had been provided.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In such case, the contributory negligence of the plaintiff in failing to call for lights is for the jury, where she testified that as soon as she discovered that the toilet room was in darkness she started back to call for light and was injured.

[1]Reported in 126 Pac. 99.

SAME—NEGLIGENCE—OPERATION—SUDDEN LURCH—EVIDENCE—SUFFICIENCY. The lurching of a passenger train does not show negligence, where there was no evidence that the lurch was so violent as not to be accounted for except upon the theory of a defective roadbed or improper management; the doctrine of *res ipsa loquitur* not applying.

Appeal from a judgment of the superior court for King county, Myers, J., entered February 17, 1912, upon granting a nonsuit, in an action for personal injuries sustained by a passenger on a railway train. Reversed.

Roney & Loveless, for appellants.

C. H. Winders, for respondent Northern Pacific Railway Company.

Chas. F. Munday, for respondent Pullman Company.

ELLIS, J.—This appeal is from a judgment of nonsuit in an action to recover damages for personal injuries to the plaintiff Annie L. Valentine, which injuries it is charged were caused by the negligence of the defendants.

The plaintiffs, husband and wife, on April 4, 1911, at about eleven o'clock p. m., took passage upon a train of the defendant railway company at Portland, Oregon, for Tacoma, Washington. They had purchased a sleeper ticket entitling them to berth No. 11 on the Pullman sleeper which formed a part of the train. This berth was the last one on the right-hand side of the car as one entered it from the rear. In the rear end of the car was the women's toilet room and lavatory, and the latter connected with the former by a door. Between this toilet room and the body of the car was a compartment or state room. At this room the main aisle of the car turned to one side and passed out to the rear end of the car. This side passageway was about 14 feet in length and about 2 feet wide. The toilet room door opened inwardly from this passage, at a point about 7 or 8 feet from where it turned toward the middle of the car. There was no light in this side passage when the plaintiffs entered the car

at eleven o'clock, nor when the accident happened. When they entered the car, and throughout the night, there was a dim light at each end of the main aisle between the berths. There was no light in the toilet room. Mrs. Valentine testified that both the passageway and the toilet room were in total darkness. At about one o'clock Mrs. Valentine, having occasion to seek the toilet room, went down this side passage, opened the toilet room door in the darkness, pushed aside a portier or curtain hanging across the toilet room just within the door, and found the toilet room also in darkness. She stepped back, intending to call the porter to light up, when the car lurched, threw her against the outer wall of the passageway and back again toward the door. She threw her right hand up to steady herself, and at that instant the door of the toilet room automatically closed, catching her little finger in the hinge side of the door, crushing it. Blood poisoning supervened, necessitating the amputation of the little finger at the second joint, and causing her whole right hand to become permanently stiff and maimed.

The amended complaint, upon which plaintiffs went to trial, alleged as a basis of liability that the defendants negligently maintained the door with a spring for closing it, so strong as to render the use of the door dangerous, and negligently kept the passage in darkness. At the close of their evidence, the plaintiffs were permitted to further amend the complaint so as to more definitely state the negligence relied upon, and to conform to their evidence. The amendment was as follows:

"Because of the door negligently constructed with a very strong spring behind it, as aforesaid, and because of the negligence of the defendants, and their servants in not warning the plaintiff, Mrs. Anna L. Valentine, of said construction as aforesaid, and because she could not see where to place her hand in a safe place on account of the aisle, passageway and dressing room negligently kept in total darkness by the

defendants as aforesaid, the plaintiff Mrs. Anna L. Valentine was injured in the manner hereinafter mentioned."

The only allegation tending to implicate the Pullman Company was the following:

"That on or about the 4th day of April, 1911, and now the defendants were and are the owners of and operate a certain railroad commonly known as the Northern Pacific Railway, together with the tracks, cars, locomotives, rolling stock and other appurtenances thereunto belonging, and were and now are common carriers of passengers for hire between the places hereinafter mentioned, among others."

This was denied by the answer of the Pullman Company, and no evidence was offered tending to show ownership, management, or dominion of the Pullman Company, further than incidental reference to the sleeping car as a Pullman car. While it was alleged and proven that the plaintiffs "purchased a sleeper ticket for lower berth No. 11, car No. 12 of said train," there was neither allegation nor proof that the ticket was purchased from the Pullman Company, or any agent or representative of that company. The nonsuit as to the respondent Pullman Company was properly granted.

As to the respondent Northern Pacific Railway Company, the case presents a different aspect. It operated the train as a common carrier. As such it was incumbent upon it to exercise the highest degree of care, prudence and foresight for the safety of its passengers, compatible with the practical performance of the duty of transportation. It would be liable for the slightest negligence with reference to the exercise of such care. This is law so familiar, and has been announced so often in various forms of expression, as to require little citation of authority. *Jordan v. Seattle, Renton & Southern R. Co.*, 47 Wash. 503, 92 Pac. 284; *Mueller v. Washington Water Power Co.*, 56 Wash. 556, 106 Pac. 476; 6 Cyc. pp. 591, 592, 593.

"This caution and vigilance must necessarily be extended to all agencies or means employed by the carrier in the trans-

portation of passengers." *Northern Pac. R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866.

The duty to exercise this highest degree of care was primarily that of the railway company. It could not avoid liability for negligence in that regard by any private contract or arrangement with the Pullman Company. *Herrman v. Great Northern R. Co.*, 27 Wash. 472, 68 Pac. 82, 57 L. R. A. 390. If there was any evidence tending to show, and from which an inference might reasonably be drawn, that the proximate cause of the injury was either an improper or dangerous spring on the door or the failure to light the passageway or toilet room, then the question of the liability of the railway company should have been submitted to the jury.

A careful consideration of the evidence leads us to the conclusion that the case, so far as dependent upon the first charge of negligence, was properly taken from the jury. It is a matter of common knowledge that when a swiftly moving train passes over even a well constructed roadbed there will be much swaying and lurching of the cars from side to side, especially in rounding curves. Common prudence would dictate that a door such as the one here in question should be provided with a spring or some other device having sufficient propulsive force to close and latch the door and prevent it when unlatched from swinging with every lurch of the car. It seems too plain for speculation that any spring which would meet that purpose would cause the door to close with sufficient force to crush a finger inserted between the door strip and the hinge side of the door as was the finger of the appellant. The evidence shows that on the doors of all cars examined by the appellants some such spring was used. True, both of the appellants testified that, by examinations of other cars at times more or less remote from the time of the accident, they found no spring so strong as the one on the door here in question. That was the sum of the evidence as to any defect in the door or spring. In view of the neces-

sity and purpose of the spring, that evidence was not sufficient to raise an inference of negligence.

The doctrine of *res ipsa loquitur* has no application to the case here presented. There was no evidence that the door closed when it should not have closed or that the spring did not perform the function for which it was intended. *Weinschenk v. New York, N. H. & H. R. Co.*, 190 Mass. 250, 76 N. E. 662.

The second charge of negligence we think presented a question for the jury. The toilet was provided for the accommodation of the passengers. There was a tacit invitation to the appellant to use it. Mrs. Valentine testified that the passage leading to the toilet was in total darkness, as was the toilet room itself; that as she afterwards discovered, there was a light in the lavatory opening into the toilet room, but the connecting door was closed so that it furnished no light to that room. She further testified that, if the passageway had been lighted, she could have seen where she was placing her hand when she sought to steady herself, and would not have been injured. The respondent contends that this was a mere conclusion, which is in a sense true. But the conclusion seems so obvious that we think it might reasonably have been drawn by the jury. As opposed to this, the respondent argues that it is more probable that she threw out her hand involuntarily, and that the injury would have resulted even had the place been lighted. This also is a mere conclusion. The evidence presents a striking instance of a situation upon which the minds of reasonable men may differ. In such a case, the question of negligence is always one for the jury.

It is well established that it is a duty of common carriers to keep their stations and platforms so lighted as to enable passengers to avoid danger in boarding and leaving trains. As to passengers, the failure to provide such light is negligence, though some authorities hold that the degree of care incumbent upon carriers as to their stations and platforms is

only ordinary care. *Chicago, R. I. & P. R. Co. v. Wood*, 104 Fed. 663; *Hiatt v. Des Moines, N. & W. R. Co.*, 96 Iowa 169, 64 N. W. 766; *Wallace v. Wilmington & N. R. Co.*, 8 Houst. (Del.) 529, 18 Atl. 818; *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Galveston, H. & S. A. R. Co. v. Thornsberry* (Tex.), 17 S. W. 521; *Jordan v. New York N. H. & H. R. Co.*, 165 Mass. 346, 43 N. E. 111, 52 Am. St. 522, 32 L. R. A. 101; *Harris v. Seattle, Renton & S. R. Co.*, 65 Wash. 27, 117 Pac. 601.

It would seem that for a much stronger reason should it be held a duty of the carrier to keep its cars so lighted as to enable passengers to avoid danger, since as to these the authorities are practically unanimous that the carrier is charged with the highest degree of care compatible with reasonable operation. When it may be reasonably assumed that the necessities of the passengers might require lights, the failure to furnish them is negligence. *Western Maryland R. Co. v. Stanley*, 61 Md. 266, 48 Am. Rep. 96.

On the motion for nonsuit the appellants were entitled to have their evidence taken as true, and all that it reasonably tended to prove taken as established. They were entitled to every favorable inference reasonably deducible from their evidence. *Young v. Aloha Lumber Co.*, 63 Wash. 600, 116 Pac. 4, and cases there cited. Whether a light in the passageway was reasonably necessary, and whether, under all the facts and circumstances and all the justifiable inferences to be drawn therefrom, Mrs. Valentine would not have been injured but for the lack of light, were questions for the jury.

It cannot be said, as a matter of law, that Mrs. Valentine was guilty of contributory negligence. The toilet room had been provided for her use. She was tacitly invited to enter it. She was where she had the right to be and was doing what she had the right to do. It is argued that she should have called the porter and asked for a light as soon as she discovered that the passageway was dark. Her testimony

was that, as soon as she discovered that the toilet room was in darkness, she started back to call for light. Whether in attempting to enter the toilet room in the darkness she did not act as an ordinarily prudent person would have acted under the same circumstances was a question for the jury. *Jordan v. New York, N. H. & H. R. Co., supra; St. Louis, I. M. & S. R. Co. v. Battle,* 69 Ark. 369, 63 S. W. 805; *West v. Thomas,* 97 Ala. 622, 11 South. 768.

The appellants in their briefs advance as a third ground for recovery that the lurching of the car showed negligence in the operation of the train or in the maintenance of the roadbed. The complaint was amended in its allegations of negligence after the evidence was in. It contains no charge of negligent operation or that the roadbed was faulty or defective. Moreover, there was no evidence to sustain either charge. Mrs. Valentine testified that the car gave a violent lurch, but there was no evidence that the lurch was so violent as not to be accounted for except upon the theory that the roadbed was defective or that the train was improperly operated. It might have resulted from rounding a curve or passing a switch. Here, again, the rule *res ipsa loquitur* has no application. That rule can only be invoked where the accident, in the light of ordinary experience, is not capable of explanation except as resulting from negligence. *De Yoe v. Seattle Elec. Co.,* 53 Wash. 588, 102 Pac. 446, 104 Pac. 647, 1133; 2 White, Personal Injuries on Railroads, § 667.

The judgment is reversed, and the cause is remanded for a new trial as to respondent Northern Pacific Railway Company.

FULLERTON, MOUNT, MORRIS, and CROW, JJ., concur.

[No. 10282. Department One. September 4, 1912.]

C. C. DILL, *as Trustee etc., Appellant*, v. LENA L. CARVER *et al., Respondents.*[1]

FRAUDULENT CONVEYANCES—PRESUMPTIONS—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. Under Rem. & Bal. Code, § 5292, providing that, where any question arises as to the good faith of a transaction between husband and wife, the burden of proof shall be upon the party asserting the good faith, the presumption that a transfer by a husband to a wife of 199 shares of corporate stock, valued at $14,000, is fraudulent as to creditors, is not overcome by clear and satisfactory proof, as required, where it appears that the husband was indebted on a judgment for $8,900, that he was being pressed for payment, that his claim that he did not know of the judgment was unfounded in fact, and that he claimed that the transfer was in consideration of $5,000 borrowed and of other stock which he had borrowed and was holding for his wife, which at one time was of the value of $9,000, but was worth only $1,000 at the time of the transfer of the stock in question; and it further appears that the $5,000 came from the sale of a house valued at $7,500 to which the husband had contributed $6,000, that he had made statements that he owned the stock, admitted that he had no intention of paying the judgment, and his evidence was wholly uncorroborated.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 27, 1911, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action by a trustee in bankruptcy to recover shares of corporate stock. Reversed.

Post, Avery & Higgins, for appellant.

Campbell & Goodwin, for respondents.

MORRIS, J.—Appellant brought this action to recover 199 shares of stock of the Bartlett-Carver Company, a corporation, alleging that the bankrupt had, without consideration, transferred the same to his wife, Lena L. Carver,

[1]Reported in 126 Pac. 86.

with intent to defraud his creditors; and appeals from an adverse judgment.

The only creditor of the bankrupt whose claim is involved in this action is James D. Murphy, whose claim was merged into a judgment in the sum of $8,900, on June 18, 1910, about two months prior to the filing by Fred R. Carver of the petition in bankruptcy. Murphy's claim, as set forth in his complaint upon which judgment was entered, is that, on May 4, 1907, Fred R. Carver sold him 200 shares of the capital stock of the Forsyth Automatic Air & Steam Coupler Company, for $7,500, conditioned that, if at any time during the next two years Murphy was dissatisfied with the stock and desired to return it, Carver would accept such return and pay Murphy the $7,500 with six per cent interest; that Murphy, within the two years, became dissatisfied and tendered the stock to Carver, demanding the repayment of his money, with which demand Carver refused to comply. These facts, although disputed by Carver, having been established by the judgment, the only question to be considered is the character of the transfer of the stock from Carver to his wife.

At the time of the deal in the Forsyth stock between Carver and Murphy, they were both residents of Chicago. In February, 1908, Carver disposed of his business at Chicago and came to Spokane to complete a business arrangement with J. D. Bartlett, who was then engaged in business at Spokane. This arrangement was consummated by the organization of the Bartlett-Carver Company, capitalized at $40,000, divided into 200 shares of stock. Into this business Bartlett turned over the business he had previously been carrying on, and received from Carver $15,600 for a half interest. On March 7, 1908, Carver subscribed for 199 shares of the stock of the Bartlett-Carver Company in his own name, and for one share as attorney in fact for his wife, who was still at Chicago and did not arrive at Spokane until April 20, 1908. Soon after Carver's arrival at

Spokane, Murphy began writing him from Chicago, calling his attention to the agreement under which they entered into their stock deal, and, expressing his dissatisfaction, demanded the return of his money. There is much of this correspondence in the record, but in view of the judgment obtained by Murphy, it is immaterial and not necessary to be referred to, other than as indicating the fact that Murphy was pressing Carver for the return of his money and threatening to institute legal proceedings to enforce its collection, and as further supplying the reason, as contended by appellant, why subsequently and on October 9, 1908, Carver transferred his stock in the Bartlett-Carver Company to his wife. This being a transaction between husband and wife, is covered by Rem. & Bal. Code, § 5292, providing that:

"In every case where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith."

Under this statute we have uniformly held that any transfer of property between husband and wife was presumptively fraudulent as against creditors, and that whoever asserts the good faith of such a transaction must overcome this presumption and establish such good faith by clear and satisfactory proof. *Liebenthal v. Price*, 8 Wash. 206, 35 Pac. 1078; *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961; *Canedy v. Skinner*, 50 Wash. 501, 97 Pac. 497; *Adams v. Wingard*, 53 Wash. 560, 102 Pac. 426; *Kalinowski v. McNeny*, 68 Wash. 681, 123 Pac. 1074. We are, therefore, brought to an examination of the evidence offered by Carver, to ascertain whether he has overcome this presumption of fraud and establish the good faith and honesty of this transfer to his wife of all of his interest in a good business, save the one share which was subscribed for in the name of the wife by Carver as attorney in fact, which Mrs. Carver has transferred to him. First, Carver says that, at the time

of this transfer to the wife, he did not know he was indebted to Murphy. The judgment in the action brought against him by Murphy, which was entered with his consent, concludes this fact against him. It is to be noted in this connection also that, as early as July, 1908, Murphy, who had been writing him since the previous March claiming an indebtedness of $7,500, and demanding its payment, informed him that he would place the matter in the hands of attorneys with instructions to commence action against him, and that Murphy's attorneys had called on him demanding payment. In the face of the judgment this is not material, except as it may reflect upon the purpose and intent of Carver to so manipulate his property affairs as to hinder Murphy in his attempt to carry out his purpose of enforcing the collection of the $7,500 through legal action.

The next assertion offered to support the good faith of the transfer is found in Carver's testimony that, in April, 1907, he borrowed from his wife some stock which he had previously given her, referred to as Tribullion stock, to use as collateral to a loan of $3,000, required by him in his business. This loan was repaid and the Tribullion stock surrendered to Carver in May, 1907. Yet he kept this stock he claims to have borrowed from his wife, and never attempted to account to her for it in any way until he used it as the basis of the transfer of the Bartlett-Carver stock in October, 1908. He says, during all this time, he kept the stock for his wife to make it more valuable. This Tribullion stock he values at $8,000 at the time he borrowed it from his wife. It kept increasing in value until in December, 1907, it was worth in the neighborhood of three dollars a share, or $9,000 more than when he borrowed it. Still he says he did not return it to his wife, but retained it, hoping for a still greater increase in value.

We cannot understand why he did not return the stock to his wife in May, 1907, when the indebtedness for which it had been pledged was fully paid. Nor why it would not

grow as valuable in her hands as in his. Nothing seems to have been done with it other than to place it in a pool with other stock in an endeavor to increase its value. He says the idea of claiming this stock as his own first came to him after he came to Spokane, and from that time on he regarded it as his stock, although no effort was made to have it transferred on the books of the company, and so far as any outward indicia of ownership indicated to whom it belonged, there was no change. This stock seems to have steadily fallen in value from about December, 1907, until on October 9, 1908, when he made it one of the considerations for his transfer of the Bartlett-Carver stock to his wife, it was worth in the neighborhood of $3,000 on a falling market, having slumped in the last valuation given to less than $1,000. In placing a value on it for the purpose of the transfer of the Bartlett-Carver stock, he fixes it at $8,000, because it was worth that much when he borrowed it from his wife, although its real value at the time of the transfer did not exceed $3,000. To this he adds $5,000 which he claims to have borrowed from his wife in November, 1907, and computing interest on both valuations at eight per cent, he makes the consideration for the transfer of the Bartlett-Carver Company stock about $14,000. It might be noted that this Tribullion stock was worth about $3,000 when he gave it to his wife, or approximately its real value on October 8, the day of the transfer, when he fixed the value at $8,000, to make part of the consideration for the transfer of the Bartlett-Carver Company stock. The $5,000 he claims to have borrowed from his wife came from the sale of a house at Evanston, Illinois, which it is stated was valued at $7,500, and to which Carver had contributed $6,000.

In explanation of the delay in transferring the Bartlett-Carver Company stock to his wife, Carver says, at the time when the stock was issued to him in March, 1908, it was his intention to transfer it to his wife, and that from that time he always regarded it as her stock, and that soon thereafter

he requested the transfer to be made, but that the secretary of the company was too much occupied with other affairs to attend to it. He admits, however, that, subsequent to the time when he first regarded this stock as his wife's and had in his mind transferred it to her, he may have made a statement to the local representative of R. G. Dun & Company that he and Bartlett owned all the capital stock of the Bartlett-Carver Company except two shares. Carver frankly admits that he had no intention of ever paying the Murphy judgment. This statement, it seems to us, throws much light on these various mental transfers of stock as between Carver and his wife, none of which, by the way, appear to have any support by any testimony from Mrs. Carver as to any of the transactions involved, nor does she appear to have had any knowledge, or to have taken any part in any, of these various transactions, unless it be that the day following the entry of the Murphy judgment, she became one of the trustees of the Bartlett-Carver Company.

We shall not attempt to discuss all the evidence, nor refer to other property in question here. It does not seem to us that this record can be read and the conclusion escaped that this transfer of the Bartlett-Carver Company stock from Carver to his wife was made for the purpose of defeating any collection of the Murphy claim, and that as to Murphy it was without consideration and fraudulent. Neither have we any doubt but that, with this stock covered up and placed beyond the reach of his creditors, if it could be successfully done, there was not sufficient property or assets remaining to satisfy the claims of creditors. We cannot, without unduly extending this opinion, refer to the other property remaining in Carver's name, which was scheduled by him as assets; nor give the reasons why we conclude them of insufficient value. It is sufficient to say we have no faith in their value to the extent claimed by Carver, or that they can be so valued as to say that, at the time of the transfer of this stock, Carver retained sufficient property to satisfy the

claims of his creditors. It is not to be wondered that Judge Rudkin, in passing on Carver's petition for discharge in bankruptcy, is quoted as saying in an opinion not published:

"If this were a proceeding under subdivision (e) of section 70 to avoid a transfer made by the bankrupt of his property for the purpose of defrauding his creditors, I might and perhaps would feel constrained to hold that the transfer was fraudulent, because the testimony of the bankrupt is uncorroborated and is anything but satisfactory. In the language of the referee, his story is 'amazingly suspicious,' but he has concealed no property from the trustee so far as the proof discloses, and the criminal charges have not been sustained to the requisite degree of certainty."

Upon the whole case as here made, we are of the opinion that the presumption that this transfer of stock between the husband and wife was fraudulent as against creditors has not been overcome by clear and satisfactory proof. We therefore hold that the 199 shares of the capital stock of the Bartlett-Carver Company in issue in this suit are the property of Fred R. Carver; that the transfer of the same by Fred R. Carver to Lena L. Carver on October 9, 1908, was fraudulent as to the creditors of Fred R. Carver, and such transfer should be set aside and held for naught, and the stock be surrendered to the trustee in bankruptcy. The judgment of the lower court is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

MOUNT, GOSE, CHADWICK, and PARKER, JJ., concur.

[No. 10285. Department One. September 4, 1912.]

HENRY N. OERTER *et al.*, *Respondents*, v. NICOLAS GEORGER *et al.*, *Appellants*.

HENRY N. OERTER *et al.*, *Respondents*, v. ROBERT B. HESKETH *et al.*, *Appellants*.[1]

APPEAL—DUPLICITOUS APPEAL—DISMISSAL. An appeal will be dismissed as duplicitous, where two separate actions, brought by different plaintiffs, upon distinct indemnity bonds against different defendants, were, upon oral agreement "tried together," and distinct judgments in different sums entered in each action, whereupon the defendants in the two actions joined in one notice of appeal from both judgments, giving one appeal and supersedeas bond, in double the aggregate of the two judgments, and $200 added; there never having been an order consolidating the two actions.

Appeal from judgments of the superior court for Spokane county, Sullivan, J., entered May 3, 1911, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in actions to recover upon restraining order bonds. Dismissed.

W. C. Donovan, for appellants.

Nuzum, Clark & Nuzum, *Alex M. Winston*, and *Geo. H. Armitage*, for respondents.

MORRIS, J.—This appeal is taken from judgments in two actions brought to recover upon restraining order bonds. We are met at the outset by respondents' motion to dismiss the appeal upon the ground that it is duplicitous, being taken from two separate and distinct judgments in two separate and distinct actions. The controlling facts are these: On July 13, 1910, the appellants Georger and Hesketh, as named in the first of these actions, commenced suit for injunctive relief, against respondents as named in the first action. A restraining order was issued upon the giving of the usual and required bond, upon which appellants

[1]Reported in 126 Pac. 103.

Cardmore and Edman were sureties. In this suit a temporary injunction was denied, and a demurrer to the complaint sustained July 21, 1910. On July 27, 1910, appellant Hesketh, as named in the second of these actions, commenced another suit for injunctive relief, against respondents as named in the second action. A restraining order was likewise granted in this suit, upon the giving of a bond with Cardmore and Edman as sureties. This suit terminated adversely to the plaintiffs on August 29, 1910. No record seems to have been made of this termination; the court before whom the hearing was being had refusing to hear argument upon motions and a demurrer then pending, holding that the restraining order was improvidently issued and that the court was without jurisdiction.

Thereafter the defendants named in the first action, respondents here, commenced an action upon the first bond, to recover attorney's fees and costs incurred in the defense of that action. At the same time they commenced the second of these actions upon the bond given in the second suit for injunctive relief, including in this action a cause of action upon a second bond given in the first action for injunctive relief upon the amending of the complaint and the issuance of a new restraining order. These two actions coming on for trial upon the same day before the same trial judge, it was orally agreed they should be tried together. The only reference in the record to this agreement is this statement of counsel made at the beginning: "There is another case to be tried with this one, also on an injunction bond. We have agreed they should be tried together." Thereupon both cases proceeded to a final determination, separate findings of fact and conclusions of law and separate judgments being entered in each case, to which separate exceptions were taken. The judgment in the action on the first suit was for $100. In the second action the judgment was for $225. Upon the entry of these separate and distinct judgments, motion for a new trial was made in each case, and the same

denied. Appellants then joined in one appeal from both judgments, and gave one appeal and supersedeas bond for $850, covering double the aggregate of the two judgments with $200 added.

Upon these facts we are of the opinion the motion to dismiss must be sustained. Each of these judgments is a separate and distinct judgment in separate and distinct actions at law, in which neither the parties nor the issues are the same. The notice of appeal is joined in by parties who are not parties to the action in which it is attempted to be given, nor affected by the judgment to be reviewed. All of the parties to the notice are parties in one or the other of the actions, but they are not all parties in each action. If there can be such a thing as a duplicitous appeal, and that will hardly be doubted, this appeal is such an one. We are averse to dismissing appeals without a review of the merits of the controversy, believing that each litigant should have the right to have his case heard in every forum provided by the state for the hearing of controversies between its citizens; but we sometimes find our hands so tied we can do nothing to relieve the situation, and must reluctantly announce the law as we find it to be. We have such a case before us, and can find no escape from the conclusions we have reached. It is sustained by all the authorities so far as we have found them. Among them are: *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 South. 228; *Waters-Pierce Oil Co. v. Van Elderen*, 137 Fed. 557; *Erwin v. Ennis*, 104 Ga. 861, 31 S. E. 444; *Chapman Mfg. Co. v. Taylor*, 61 Ohio St. 394, 55 N. E. 1003; *Walker v. Conn*, 112 Ga. 314, 37 S. E. 403; *Wells v. Coker Banking Co.*, 113 Ga. 857, 39 S. E. 298; *Brown v. Louisville & N. R. Co.*, 117 Ga. 222, 43 S. E. 498.

This exact situation has never been presented to us before. As, however, illustrating our aversion to dismiss appeals on similar motions, where we could find a loophole for escape, we cite the following cases from our own opinions. In *First*

Nat. Bank v. Fowler, 51 Wash. 638, 99 Pac. 1034, four actions had been consolidated by order of the court. Upon the determination of this consolidated case, one set of findings was presented, which were denied, the court making a finding in each of the cases which he incorporated in a judgment in each case. To these four judgments, one motion for a new trial was made, which was denied, and one appeal was then taken. A motion to dismiss this appeal upon the ground that there were four judgments was denied, for the reason that the order of consolidation being general could not be overcome by the entry of four judgments, until it was vacated by an order of equal formality, and that to hold otherwise would defeat the order of consolidation. It will be noted that, in the cases now before us, there was no order of consolidation; simply an agreement that they be tried together. That this was not understood to be a consolidation of these two actions is apparent from the fact that counsel for both parties presented findings and conclusions in each case with separate judgments.

In *O'Connor v. Force*, 58 Wash. 215, 108 Pac. 454, 109 Pac. 1014, two actions for wages, against the same defendant, were ordered consolidated and one judgment was entered. The motion to dismiss was denied because of the consolidation and the one judgment. In *Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 822, two cases, in each of which the plaintiff claiming as a wife was seeking to establish a right in certain property, were tried together as here for the convenience of witnesses and costs. There was, however, but one judgment. The motion to dismiss was made upon the ground that there was but one statement of facts covering the two cases. It was denied upon the ground that, under the agreement to try the cases together, the entry of one judgment acted as a consolidation. In *State ex rel. Powell v. Fassett*, 69 Wash. 555, 126 Pac. 963, a proceeding in *quo warranto* was brought against Fassett, as commissioner of public utilities of Spokane, and George

H. Burke, a construction foreman in the water department. A demurrer was sustained as to Fassett, upon which a dismissal was entered. The case went to trial as to Burke, and was dismissed, and judgment so entered. One appeal covered both these judgments, and it was sustained because there was but one suit. The appeal before us cannot be brought within any of these cases, nor can it be sustained by the application of any reason supporting our opinion in any of them. The jurisdiction of this court must be invoked by separate appeals from separate judgments in separate cases, just as much as the jurisdiction of the lower court is invoked by separate process in each case. There can be no exception to this practice unless it be under circumstances such as were found in our own cases previously noted, where a formal order of consolidation unites the cases in one, or where they, though not formally consolidated, are so treated by the court below and the parties thereto, by the entry of one judgment. This case presents neither of these situations, and it must be so ruled.

The motion to dismiss is granted.

PARKER, CHADWICK, GOSE, and MOUNT, JJ., concur.

[No. 10210. Department One. September 6, 1912.]

FRANK MORRAN, *Respondent*, v. CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. An instruction briefly stating the issues and adding that defendant denies "other material" allegations, is not prejudicial in leaving the jury to determine what were the material allegations, where other instructions fully informed the jury as to what facts would sustain or defeat the recovery, and the jury had the pleadings for their guidance.

SAME. Instructions must be considered as a whole, and a case will not be reversed for failure to incorporate all points in a single instruction, if covered in the balance of the charge.

[1]Reported in 126 Pac. 73.

SAME. An instruction submitting an issue as to whether a scaffold was built under the direction of "defendant's foreman," is not objectionable as assuming that a certain employee was such foreman, where, by other instructions, the jury were told what facts would establish whether he was defendant's foreman or plaintiff's fellow servant.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered July 8, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a defective scaffold. Affirmed.

George W. Korte and *Hayden & Langhorne*, for appellant.
Burkey, O'Brien & Burkey, for respondent.

CROW, J.—Action by Frank Morran against Chicago, Milwaukee & Puget Sound Railway Company, a corporation, to recover damages for personal injuries. From a judgment in his favor, the defendant has appealed.

At the time of his injury, respondent, who was twenty-two years of age, had considerable experience as a carpenter in shop work and at bench work, but had not worked upon scaffolding. There was evidence tending to show that, for a short time prior to the date of his injury, he had been employed by appellant at carpenter work that did not require him to go upon any scaffolding; that on December 10, 1910, he was directed to assist in shingling the roof of a railroad bunkhouse or hotel which required the use of a scaffold; that appellant then had a scaffold which it had used upon the opposite side of the building; that respondent was ordered by one Newton to assist other employees in carrying the scaffold from one side of the building to the other and in putting it in place; that respondent told Newton he feared the scaffold would not be safe as supported; that Newton assured him it would; that respondent, being unfamiliar with scaffolding of that particular construction and relying on Newton's assurances, went to work, and that within a few minutes the

scaffold slipped and threw him to the ground, causing the injuries of which he complains.

Respondent alleged that Newton was appellant's foreman, whose orders he was required to obey. It is conceded that one Gugenmeyer was appellant's general foreman, but he was absent at the time of the accident, and respondent contended that in his absence Newton was authorized to act, and did act, as foreman. Appellant denied that Newton was its foreman, and one of the issues was whether he was appellant's foreman or respondent's fellow servant. The alleged negligence of appellant upon which respondent based his claim to damages was that appellant did not furnish him a safe or suitable scaffold upon which to work. Appellant pleaded the defenses of assumption of risk, negligence of fellow servants, and respondent's contributory negligence. It is unnecessary to give a detailed description of the scaffold. The evidence, without dispute, shows that respondent had nothing to do with the adoption of the plan upon which it was constructed, or the selection of the material used in its construction. He did participate in moving it from one portion of the building to another.

Appellant admits that the evidence was sufficient to make a case for the consideration of the jury. Its only assignments are predicated on the instructions, its first contention being that the trial judge did not specifically and fully state the material issues of the case. We find no merit in this contention. It seems to be predicated upon the fact that, after briefly stating the nature of the action, the trial judge in part said:

"Defendant company, in its answer to plaintiff's complaint, admits plaintiff received some injury at the time and place mentioned, but denies that said injury was due to any negligence on the part of defendant company, or its agents; (defendant also denies the other material allegations of plaintiff's complaint.)"

Appellant insists that, under this instruction, the jury had to determine what allegations of the complaint were material

or immaterial, and appellant's counsel in making their argument apparently assume that no other instruction explaining the issues was given. In this they are mistaken. Immediately after making the instructions quoted, the trial judge informed the jury that appellant had pleaded the defenses above mentioned, and further instructed them as follows:

"You are instructed that the burden of proof in this case is upon the plaintiff, and before he can recover on account of the alleged negligence on the part of the defendant, in having for use a weak, defective or unsafe scaffold, it is necessary for the plaintiff to prove by a fair preponderance of the evidence,

"First. That the scaffold was unsafe, weak or defective and that the accident happened as the result of such weakness, insufficiency or defect.

"Second. That the defendant had notice or knowledge of such weakness, insufficiency or defect, or that it might have had notice thereof by the exercise of ordinary care.

"Third. That the plaintiff did not know of such insufficiency or defect and that he had no means of knowledge thereof, equal to those of the defendant.

"Fourth. That he was, at the time of the accident, in the exercise of ordinary care.

"If the plaintiff fails to prove by a fair preponderance of the evidence any one of these four propositions, then it is your duty to find for the defendant, even though you find that the man Newton was the foreman and gave directions and assisted in constructing the scaffold in question."

In other instructions, the jury were charged as to what facts, if proven, would sustain or defeat a recovery by respondent. From the entire instructions, it is impossible to conceive that the jury could have been misled, or that they could have misunderstood the exact issues of the case. Moreover, they had the pleadings for their guidance. The issues were fairly and clearly stated. *Tibbitts v. Spokane*, 64 Wash. 570, 116 Pac. 397.

Appellant assigns error on the following instruction:

"You are instructed that if you find from the evidence that the plaintiff was employed by the defendant as a carpenter to assist in the shingling of a hotel of the defendant's at or

near Monckton, Washington, and if you find that it was reasonably necessary in order to perform the said work of shingling the said hotel building to have a scaffolding constructed along the said building for the use of the plaintiff and other employees of the defendant in doing said work, and that the defendant did furnish a scaffolding for the said purpose, and that the materials which were used in the construction of the same were determined by the defendant, and that the method or form of construction of the said scaffolding was determined by the defendant and the scaffolding was erected in conformity therewith, and that the work of erecting the said scaffolding was under the immediate supervision and control of the defendant's foreman, and that the defendant's foreman directed the work of constructing the said scaffolding, and if you further find from the evidence that the defendant failed to exercise reasonable care in furnishing a safe and sufficient scaffold for the use of the plaintiff and other employees of the defendant in the shingling of the said hotel building, or that the defendant furnished a scaffold for the use of the said plaintiff and other employees of the defendant in doing the said work that was different from the ordinary and usual scaffold constructed and used for the purpose and was constructed in an unusual manner, and that the same was not reasonably safe for the use of the plaintiff and other employees of the defendant in doing the said work of shingling the said hotel building, and that by reason thereof plaintiff, while in the exercise of ordinary care, and while acting as an ordinarily prudent person, and without fault or negligence on his part, and without knowledge on his part that the said scaffold was unsafe, was injured while engaged at the said work of shingling the said hotel building for the defendant, then your verdict should be for the plaintiff."

Complaining of this instruction and two others similar in form, appellant contends that they assume as true facts which were in issue and upon which the evidence was conflicting; that they are argumentative, misleading, and contradictory; that they collate respondent's evidence without the slightest reference to that produced by appellant; that they refer to Newton as appellant's foreman, assuming that he was employed to control and direct respondent's movements and

that he was such foreman. Reading all instructions given, it becomes apparent that these contentions are devoid of merit. We have repeatedly announced the rule that the entire body of the instructions must be considered. All points of law involved in the ordinary case cannot be incorporated in a single instruction; hence, it will be sufficient if they are covered by the instructions as a whole. The trial court did not assume, nor did he state, that Newton was appellant's foreman. On the contrary he, by other instructions, submitted that issue to the jury in clear and concise language. He also told them what facts would have to be proven to warrant a finding that respondent and Newton were fellow servants, and what facts would have to be proven to sustain respondent's contention that Newton was appellant's foreman. No exceptions are now urged to the instructions thus given. The record shows that the jury were correctly instructed upon every principle of law applicable to appellant's, as well as respondent's, theory of the case, and that no prejudicial error was committed.

The judgment is affirmed.

PARKER and GOSE, JJ., concur.

[No. 10346. Department One. September 6, 1912.]

JOHN J. WARD *et al.*, *Appellants*, v. E. P. GAFFNEY *et al.*, *Respondents*.[1]

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence, where the trial court saw and heard the witnesses, will not be disturbed on appeal, when sustained by the evidence.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 9, 1912, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

[1]Reported in 126 Pac. 83.

near Monckton, Washington, and if you find that it was reasonably necessary in order to perform the said work of shingling the said hotel building to have a scaffolding constructed along the said building for the use of the plaintiff and other employees of the defendant in doing said work, and that the defendant did furnish a scaffolding for the said purpose, and that the materials which were used in the construction of the same were determined by the defendant, and that the method or form of construction of the said scaffolding was determined by the defendant and the scaffolding was erected in conformity therewith, and that the work of erecting the said scaffolding was under the immediate supervision and control of the defendant's foreman, and that the defendant's foreman directed the work of constructing the said scaffolding, and if you further find from the evidence that the defendant failed to exercise reasonable care in furnishing a safe and sufficient scaffold for the use of the plaintiff and other employees of the defendant in the shingling of the said hotel building, or that the defendant furnished a scaffold for the use of the said plaintiff and other employees of the defendant in doing the said work that was different from the ordinary and usual scaffold constructed and used for the purpose and was constructed in an unusual manner, and that the same was not reasonably safe for the use of the plaintiff and other employees of the defendant in doing the said work of shingling the said hotel building, and that by reason thereof plaintiff, while in the exercise of ordinary care, and while acting as an ordinarily prudent person, and without fault or negligence on his part, and without knowledge on his part that the said scaffold was unsafe, was injured while engaged at the said work of shingling the said hotel building for the defendant, then your verdict should be for the plaintiff."

Complaining of this instruction and two others similar in form, appellant contends that they assume as true facts which were in issue and upon which the evidence was conflicting; that they are argumentative, misleading, and contradictory; that they collate respondent's evidence without the slightest reference to that produced by appellant; that they refer to Newton as appellant's foreman, assuming that he was employed to control and direct respondent's movements and

that he was such foreman. Reading all instructions given, it becomes apparent that these contentions are devoid of merit. We have repeatedly announced the rule that the entire body of the instructions must be considered. All points of law involved in the ordinary case cannot be incorporated in a single instruction; hence, it will be sufficient if they are covered by the instructions as a whole. The trial court did not assume, nor did he state, that Newton was appellant's foreman. On the contrary he, by other instructions, submitted that issue to the jury in clear and concise language. He also told them what facts would have to be proven to warrant a finding that respondent and Newton were fellow servants, and what facts would have to be proven to sustain respondent's contention that Newton was appellant's foreman. No exceptions are now urged to the instructions thus given. The record shows that the jury were correctly instructed upon every principle of law applicable to appellant's, as well as respondent's, theory of the case, and that no prejudicial error was committed.

The judgment is affirmed.

PARKER and GOSE, JJ., concur.

[No. 10346. Department One. September 6, 1912.]

JOHN J. WARD *et al.*, *Appellants*, v. E. P. GAFFNEY *et al.*, *Respondents*.[1]

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence, where the trial court saw and heard the witnesses, will not be disturbed on appeal, when sustained by the evidence.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 9, 1912, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

[1]Reported in 126 Pac. 83.

John W. Roberts and *George L. Spirk*, for appellants.

Brady & Rummens, for respondents.

PER CURIAM.—This action was commenced by John J. Ward and John A. Scherer, copartners as Ward & Scherer, to recover for plumbing work alleged to have been performed for the defendants, E. P. Gaffney and H. P. Eaton, at their special instance and request. From a judgment in favor of the defendants, the plaintiffs have appealed.

The plumbing work was done in a hotel in the city of Seattle. There is no dispute as to the work done, its value, or the amount remaining due appellants. The only issue is whether the work was done for respondents or for Seattle Hotel Company, a corporation. Appellants claim the defendants were partners under the firm name and style of Gaffney & Eaton, that they were in charge of the hotel, ordered the work, and personally agreed to pay for the same. This the respondents deny. They contend the work was ordered by Seattle Hotel Company, of which they were stockholders and officers; that all payments made on account of the work were made by the corporation. The evidence was conflicting. The trial court saw the witnesses, heard them testify, passed upon their credibility, examined the documentary evidence, and found for respondents. After reading the entire record, we conclude the findings and judgment must be sustained. It is so ordered.

[No. 10111. Department One. September 6, 1912.]

MOSES LAND SCRIP AND REALTY COMPANY, *Appellant*, v. STACK-GIBBS LUMBER COMPANY, *Respondent*.[1]

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal if sustained by the preponderance of the testimony.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. In an action tried to the court, errors of law in the rejection or admission of evidence are not prejudicial, where the result would not have been different.

PRINCIPAL AND AGENT—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether a person was the agent of the defendant corporation, an admission in another case that he was the agent of one of the defendant's officers is inadmissible; especially where the agency was not in issue in such case.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 14, 1911, upon findings in favor of the defendant, after a trial before the court without a jury, in an action on contract. Affirmed.

Peacock & Ludden, for appellant.

Reese H. Voorhees, for respondent.

PER CURIAM.— Upon a former appeal from a judgment of nonsuit we held that a *prima facie* case had been made out, and reversed the order of the lower court with instructions to put defendant to its proofs. 56 Wash. 529, 106 Pac. 207. From a judgment in favor of the defendant, this appeal is taken.

Reference to the former opinion will show that it was essential to plaintiff's case that it prove that one A. A. D. Rahn was the agent of the defendant. The record in this case comprehends more than twelve hundred pages, nearly one thousand pages of typewritten testimony. We have undertaken to make ourselves familiar with the whole record, for

[1]Reported in 126 Pac. 103.

each side asserts the falsehood and perjury of the other and insists or implies that a careful scrutiny of the evidence will sustain its contentions. The primary question involving only a question of fact, a review or critical analysis of a record of such volume would unnecessarily extend the limit of our opinion. It is enough to say that, while we may agree with counsel for both parties that there has been an overstatement of the truth by the adverse party, it is due no doubt to the time elapsing between the matters testified to and the trial. Yet, withal, a careful consideration of the evidence convinces us that the conclusions and judgment of the trial court are sustained by a preponderance of the evidence.

Errors of law in the rejection and admission of evidence are assigned as error, but our conclusion upon the main issue makes them immaterial. Nor would our judgment be different had the ruling of the court been otherwise in the respect complained of. One alleged error perhaps should be noticed. Plaintiff sought to introduce the testimony of the admitted principal of Rahn, taken in another case, as a declaration against interest. An examination of the deposition convinces us that it was properly rejected. It only tends to show that one of the officers of the defendant had an interest in the subject-matter of Rahn's dealing in timber lands, and was wholly insufficient to prove that Rahn was the agent of the defendant; or, if it tended to do so, it would not bind defendant, for the question of agency does not appear to have been an issue in the other case.

Judgment affirmed.

[No. 10270. Department One. September 6, 1912.]

PIONEER SAND & GRAVEL COMPANY, INCORPORATED, *Respondent*, v. INTERNATIONAL CONTRACT COMPANY, *Appellant*.[1]

EVIDENCE—DOCUMENTARY EVIDENCE—BOOK ENTRIES—ADMISSIBILITY. Entries in account books of a corporation are admissible, where the employee who made the original notations with knowledge of the transaction had left the country, and could not be found or produced, and his employment, duties and handwriting were proven.

Appeal from a judgment of the superior court for King county, Yakey, J., entered December 9, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Preston & Thorgrimson and *Sandford C. Rose*, for appellant.

W. H. White, for respondent.

PER CURIAM.—Action by Pioneer Sand & Gravel Company, Incorporated, a corporation, against International Contract Company, a corporation, and the city of Seattle, to recover for sand and gravel sold by the plaintiff to the defendant International Contract Company, to be used in performance of a contract which it had with the city of Seattle. From a judgment in plaintiff's favor against the defendant International Contract Company, the latter has appealed.

Appellant concedes that it did purchase sand and gravel from respondent. The only dispute relates to the quantity delivered. Respondent demanded judgment for $2,258.45, while appellant conceded $1,507.52, for which it offered to confess judgment, but denied its indebtedness in any greater sum. The only issue involved is whether the respondent sold and delivered the amount of sand and gravel alleged in its

[1]Reported in 126 Pac. 84.

complaint. On conflicting evidence the trial judge found that it did, and after reading the entire record, we conclude the finding must be sustained.

Some question is raised by appellant as to the competency of certain entries in respondent's books which were admitted in evidence. Respondent's employee, who superintended the original measurement and shipment of the sand and gravel and made the original notations for the books, was no longer in respondent's employ, had left the country, could not be found, and therefore could not be produced as a witness on the trial. His employment, duties, and handwriting were proven, and his absence accounted for. The evidence was competent and admissible. *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158; *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172; *Lawn v. Prager*, 67 Wash. 568, 121 Pac. 466.

The judgment is affirmed.

[No. 10341. Department Two. September 6, 1912.]

PERA BARACH *et al.*, *Respondents*, v. G. A. CARLSON *et al.*, *Appellants*.[1]

MASTER AND SERVANT—ASSUMPTION OF RISKS—SAFE PLACE—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A pitman in a steam shovel crew does not assume the risk of danger from rock falling down the slope, when the steam shovel was idle, if he was in a position where he could not see the danger, even though warned of danger by one fellow servant who was contradicted by another co-servant who sometimes directed the work, where there was evidence that the rock did not fall from the place where the work was being done, but from the side of the cut where the wall was completed from which rocks were not accustomed to fall; since the master is liable if he carelessly allowed the place to become unsafe without notice to the servant.

[1]Reported in 126 Pac. 94.

APPEAL—REVIEW—HARMLESS ERROR. Error cannot be assigned in refusing to instruct that mortality tables are of little weight as evidence of life expectancy when the health of the deceased was not shown, where no question was made as to the amount of the verdict, but only to the right of recovery.

Appeal from a judgment of the superior court for Spokane county, Black, J., entered October 14, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Affirmed.

Edward J. Cannon, George M. Ferris, and *Charles E. Swan,* for appellants.

Cohn & Rosenhaupt and *T. T. Grant,* for respondents.

MOUNT, J.—The plaintiffs, being the wife and minor children of Stanisha Barach, deceased, brought this action to recover damages for the alleged wrongful death of the deceased. Upon a trial of the cause to the court and a jury, a verdict was returned in favor of the plaintiffs. The defendants have appealed from a judgment entered upon the verdict.

The principal contention of the appellants is that the evidence is insufficient to support the verdict, and for that reason the court erred in denying defendants' motions for a nonsuit, for a directed verdict, and for a judgment *non obstante veredicto,* and in entering the judgment upon the verdict.

The testimony shows that the defendants were engaged in making an excavation or a deep cut for a railroad near the town of Hooper, in this state. This work was being done by means of a steam shovel. The deceased was employed as a pitman on the steam shovel crew, which crew consisted of a foreman, a craneman, an engineer, and six pitmen. The deceased was a foreigner. He had been in this country about two years previous to his employment by the defendants. He had theretofore been employed as common laborer. His employment by the defendants consisted in removing ties

and rails from the rear of the steam shovel and placing them in front of the trucks thereof, so that the shovel could be moved forward and up to the work to be done. Deceased had been engaged in this work for about six days. The cut in which the shovel was working was about one hundred feet in width at the top, forty feet in width at the bottom, and from twenty to thirty-five feet in depth. The soil in which the work was done consisted of rocks, gravel and earth, some of which would roll down when the shovel or dipper thereof was operating in the bank at the face of the cut.

At the time of the accident, the deceased was engaged in placing ties in front of the trucks of the shovel, upon which ties rails were to be placed. The dipper of the shovel was not being operated at that particular time, because a train of cars loaded with soil had just been moved out and the shovel was waiting for an empty train to be moved in and alongside. Nick Barach, a brother of the deceased, was working on the side of the shovel opposite the deceased. He told the deceased not to go alongside of the shovel to put ties in place at that time, because of the dangerous condition of the slope on that side. The craneman, who overheard this remark and who was high up on the machinery of the shovel, told deceased that there was no danger, to hurry up with the work. The deceased was unable to see the slope on account of the machinery over the place where he was working. While he was about his work, a large rock, which rolled down from the side of the slope, struck him and killed him.

There was evidence to the effect that, at the time the deceased was employed, he was sent to work at the shovel to be under the direction of the engineer and craneman upon the shovel. The evidence of the defense was to the effect that the engineer had control of the pitman only when the foreman and superintendent of the work were absent, and that the craneman had no control whatever over the pitman unless the foreman, superintendent, and engineer were all absent,

and at the time of the accident, all these men were present. The statement that the foreman and superintendent were present was disputed. The complaint alleged that the defendants were negligent in failing to inspect the walls of the cut, thereby permitting the place to become unsafe, and that, with knowledge of the danger, the defendants directed the deceased to perform the work where he lost his life.

Appellants argue that the doctrine of safe place has no application to this case, and that the deceased assumed the risk because the danger of falling rock was one of the dangers incident to the work. *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202, and *White v. Spokane & Inland Empire R. Co.*, 54 Wash. 670, 103 Pac. 1119, and other cases are cited to support this contention. We think the rule in those cases does not control this, because there the plaintiffs knew of the dangers and assumed them. In this case the plaintiff did not know of the dangers. He was in a place where he could not observe the condition of the slope above him. It is true the deceased was warned by his brother that the place was dangerous, but he was not in a position to see for himself, and at the same time he was told by the craneman, who at times gave orders as a superior, that the place was safe, and he was directed to hurry with his work. The deceased thereupon, in obedience to this order, proceeded with his work and was killed. If the craneman was not a vice principal but a fellow servant only, his statement that the place was safe tended to, and no doubt did, cause the deceased to believe that the place was safe from danger which he could not see, and caused him to disregard the warning of danger which he had received from his brother. While the master might not be liable for the mistaken information of a coservant, still, if the master by negligence permitted the place to become unsafe without notice to the servant, the servant would not assume the risk of such unsafe place. *McLeod v. Chicago, Milwaukee & P. S. R. Co.*, 65 Wash. 62, 117 Pac. 749.

Appellants argue that the deceased must be held to have known the ordinary risks and dangers incident to work in the cut, for he must have seen that rocks of various sizes were rolling down the slope, and that the very nature of the work with its changing conditions rendered the place more or less unsafe, and having knowledge of these facts, deceased must have assumed the risk. It is true the evidence shows that, when the dipper of the shovel was digging into the bank in the face of the cut, rocks were constantly falling down, and of these dangers the deceased was, of course, aware because he could see them, and he knew that these dangers could not be guarded against by the master. The evidence is not clear as to the exact point from which the rock came which killed deceased, but the evidence is clear that the rock did not fall from the dipper or from the face of the cut where the dipper had last been working. The rock fell from a point back of the dipper and alongside the main part of the shovel, where the respondents claim the side wall of the cut was completed. The evidence shows that it fell from a point alongside of the cut, about twenty-five feet high, and which could have been reached by the dipper. In other words, the rock fell from the side of the cut and not from the face of it. It was not shown that rocks were accustomed to fall from the side of the cut and roll down against or under the shovel as this one did, and it was not shown that the deceased knew that the rock was about to fall or was dangerous. The contrary appears, and hence it follows that the deceased did not, as a matter of law, assume the risk of such dangers. *Hilgar v. Walla Walla*, 50 Wash. 470, 97 Pac. 498, 19 L. R. A. (N. S.) 367; *Fuestan v. Langan*, 67 Wash. 212, 121 Pac. 55. Under the evidence in this case, the questions of negligence of the defendants and assumed risk of the deceased were questions for the jury.

Upon the trial of the case, mortality tables showing the expectancy of life of the deceased were received in evidence. No evidence was offered showing the state of the health of de-

ceased or his habits. Defendants requested the court, for that reason, to instruct the jury that such tables were of little value or weight as evidence of expectancy of life of the deceased. This request was refused, and error is based thereon. This instruction could affect only the amount of recovery. It did not go to the right of recovery. Since no question is made upon the amount of the verdict, the refusal to give the instruction, if error, was harmless.

The remaining assignments of error, based upon the instructions, are determined by what we have said upon the assignments relating to directed verdict and nonsuit. We find no error. The judgment is therefore affirmed.

MORRIS, FULLERTON, ELLIS, and PARKER, JJ., concur.

[No. 10359. Department One. September 6, 1912.]

MARIE PURCELL, *Respondent*, v. STANTON WARBURTON *et al.*, *Appellants*.[1]

LANDLORD AND TENANT—BREACH OF COVENANT—MEASURE OF DAMAGES. Under a lease of rooms to be sublet for furnished lodgings, the measure of damages for breach of the lessor's covenant to furnish heat is the difference between the value of the use of the rooms as furnished by the lessee and heated as contemplated by the contract, and the value of the use as in fact heated by the lessor.

APPEAL—REVIEW—HARMLESS ERROR. Failure to strictly adhere to the correct rule of damages in propounding questions to a witness is harmless where the same testimony would have been elicited had the questions been asked in the correct form.

LANDLORD AND TENANT—BREACH OF COVENANT — EVIDENCE — INSTRUCTIONS. In an action for breach of a covenant in a lease to furnish heat for rooms to be sublet for lodgings, evidence to show that lodgers suffered discomfort and illness by reason of failure to properly heat the rooms is relevant, where proper instruction on the measure of damages eliminated all elements of damages suffered by the lodgers.

[1]Reported in 126 Pac. 89.

SAME—INSTRUCTIONS. In such case, refusal to instruct that there could be no recovery if the rooms were kept as full as when properly heated, is harmless.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error in giving a written instruction after the close of the argument, when the law requires that it be given before argument, is harmless, where it covered inconsequential matter, was correct in the abstract, and without prejudice.

TRIAL—SPECIAL INTERROGATORIES—DISCRETION. Error cannot be assigned on the refusal to submit special interrogatories to the jury, the matter being entirely discretionary.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered November 17, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for breach of covenant. Affirmed.

Boyle, Warburton & Brockway, for appellants.

L. C. Whitney and *John Leo*, for respondent.

CHADWICK, J.—On the 1st day of February, 1910, the defendants leased to the plaintiff the fourth floor of the Warburton building, in the city of Tacoma, for the term of two years from that day, at a monthly rental of $125 per month, for lodging rooms and apartment purposes. The lease contained a covenant on the part of the defendants to heat the demised premises with steam heat for and during the whole term of the lease. The plaintiff entered into possession under the lease, and furnished the rooms, to be rented or sublet for lodgings or apartments as contemplated by the parties. The present action was thereafter instituted to recover damages for a breach of the covenant to furnish steam heat. The jury returned a verdict in favor of the plaintiff in the sum of $1,350, and from the judgment on the verdict, the defendants have appealed.

While many errors are assigned in the admission of testimony and the giving of instructions and refusing to give instructions requested, the whole controversy in this court is over the rule or measure of damages in this class of actions

and adherence to such rule or measure by the court in its rulings throughout the trial. On the question of damages, the court instructed the jury as follows:

"If you find that the defendants failed to properly heat said leased premises, as I have hereinbefore told you it was their duty to do, such failure constituted a breach of their contract or covenant to heat, embodied in the lease, and the general rule is that a party injured by a breach of a contract is entitled to recover all such damages as might be reasonably and naturally expected to, and do in fact, flow from the breach. I instruct you that the measure of damages in this case, if you find for the plaintiff, is such an amount as will compensate her for all damages which you find from the evidence she sustained by reason of the defendants' failure to heat, or sufficiently heat, the leased premises; that amount will consist in the difference, if any, between the rental value of the premises, furnished as they were, properly and sufficiently heated, and the rental value thereof, heated in the manner you find they were heated during the period of time from February 1st, 1910, to September 18th, 1911."

The foregoing instruction was approved in *Kohne v. White*, 12 Wash. 199, 40 Pac. 794, and is, in our opinion, entirely free from objection. The two leading cases on the question under discussion are *Myers v. Burns*, 35 N. Y. 269, and *Hexter v. Knox*, 63 N. Y. 561. In the latter case, the court said:

"We are of opinion that, within the same principle, the jury were properly instructed that the plaintiff was entitled to recover the value of the use of furnished rooms to the extent that the plaintiff was prepared to furnish them with the furniture stored, and intended to be used in the rooms in the new building. The plaintiff, by the delay, lost as to such rooms their use as furnished rooms. The defendant knew that the plaintiff's furniture had been taken from No. 97 Spring street to enable him to remove the building on that lot, preparatory to erecting the new one, and that the new part was to be occupied by the plaintiff for the same purposes as he had occupied the building from which the furniture was taken. The loss of the use of the furniture from delay in completing the rooms in the new building was the

natural result of the failure of the defendant to perform his covenant; and that this loss would occur if the defendant failed to complete the building in time, may justly be presumed from the evidence to have been contemplated by the defendant, when the lease was made, as one of the injuries which the plaintiff would sustain from his default, and was properly allowed as part of the damages sustained."

The correct measure of damages is, therefore, the difference between the value of the use of the rooms as furnished by the plaintiff and heated as contemplated by the contract, and the value of their use as in fact heated by the defendants. And while counsel for respondent did not adhere strictly to this rule in propounding his questions, we feel entirely safe in saying that his departure from it resulted in no substantial prejudice to the appellants. Witnesses were asked to fix "the fair market value of the rooms;" "the net value of the rooms less running expenses," etc. But in the end the result was the same—a distinction without a difference. Had the question been asked in the language of the rule we have adopted, the same testimony would have been elicited, followed by the same result.

Some testimony crept into the record incidentally tending to show that some of the inmates of the house suffered personal discomfort or became ill by reason of the failure of the appellants to properly heat the rooms, and the failure of the court to instruct the jury that they should not take such discomfort or illness into consideration in determining the amount of their verdict is assigned as error. This testimony was relevant and proper, as it tended to show the state or condition of the rooms, and the explicit rule of damages laid down by the court of necessity eliminated all such elements of damage from the consideration of the jury. The same may be said of the failure of the court to instruct the jury that there could be no recovery if the rooms were kept as full as they would have been if properly heated and at the same rates.

Exception is also taken to a written instruction given by the court after the close of the arguments. This instruction

was given in plain contravention of the policy of the law, which requires instructions to be given in writing at the conclusion of the testimony and before the arguments of counsel, and the practice is not to be commended unless counsel are given further opportunity to argue the case in the light of the additional charge. But the supplemental charge in this case only related to four days of the entire term. Its correctness in the abstract is not questioned, and the error, if any, is without prejudice.

The court refused to submit certain interrogatories to the jury. We have so often decided that the submission of special interrogatories rests entirely in the discretion of the trial court, that the question is no longer an open one here.

The foregoing disposes of the principal assignments of error. The verdict is supported by sufficient competent testimony, and no substantial error appearing, the judgment is affirmed.

GOSE, CROW, and PARKER, JJ., concur.

[No. 10068. Department One. September 6, 1912.]

L. G. RAYNOR *et al.*, *Respondents*, v. TACOMA RAILWAY & POWER COMPANY *et al.*, *Appellants*.[1]

TRIAL—INSTRUCTIONS—WRITTEN INSTRUCTIONS—NECESSITY—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 339, providing that the charge of the court must be reduced to writing and taken to the jury room, and § 395, providing that the same shall become a part of the record upon being filed with the clerk, it is reversible error to give orally an instruction relating to the credibility of witnesses, which could not be taken to the jury room, or made a part of the record without a statement of facts; and the statute being mandatory, it is immaterial that the instruction was without prejudicial effect (CHADWICK, J., dissenting).

DAMAGES—PERSONAL INJURIES—INSTRUCTIONS—DOUBLE DAMAGES. In an action for personal injuries which resulted in a miscarriage, instructions that the plaintiff could recover for pain and suffering

[1]Reported in 126 Pac. 91.

and impairment of health and "also" for the pain and suffering and mental anguish by reason of the miscarriage, is not open to the objection that it authorized a double assessment for the miscarriage, where from all the instructions, it could not have been so understood by the jury.

DAMAGES—PERSONAL INJURIES—RESULTING MISCARRIAGE. In an action for personal injuries which resulted four days later in a miscarriage attended with unusual pain, suffering and bodily injury, plaintiff may recover for the pain and suffering and mental anguish by reason of the miscarriage.

Appeal from a judgment of the superior court for Pierce county, Gay, J., entered May 5, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger in alighting from a street car. Reversed.

J. A. Shackleford and *F. D. Oakley*, for appellants.

Govnor Teats, *Hugo Metzler*, *Leo Teats*, and *Ralph Teats*, for respondents.

CROW, J.—This action was commenced by L. G. Raynor and Edith Raynor, his wife, against Tacoma Railway & Power Company, a corporation, M. Mattison and George Carpenter, to recover damages for personal injuries to Edith Raynor, sustained in falling or being thrown from a street car operated by defendant corporation, and on which car the defendants Mattison and Carpenter were conductor and motorman. The action was dismissed as to the defendant Carpenter, and this appeal is prosecuted from a judgment in plaintiffs' favor against the remaining defendants.

After the close of all the evidence, the trial judge charged the jury in writing, and at considerable length, on the law of the case. After doing so, he further instructed them orally as follows:

"I think I will say this further orally: If you do believe that any of the witnesses have testified falsely in any material matter in this case, then you are at liberty to disregard all the testimony of said witnesses except in so far as you find it

corroborated by credible witnesses in the case or facts and circumstances in the case."

To this oral instruction, not covered by the written charge, the defendants excepted, for the reason that, in giving the same, the trial court disregarded the statute which requires the charge to be in writing and read to the jury. Appellants' first assignment is that the trial court erred in giving the instruction orally. Subdivision 4 of § 339, Rem. & Bal. Code; Laws of 1909, page 184, ch. 86, § 1, provides that:

"The court must reduce the charge to be given to the jury to writing, and at the conclusion of the evidence he shall read his written charge to the jury. . . . If a stenographer shall be in attendance upon the trial of the cause, the court shall have the right to dictate the charge he desires to give to such stenographer, and to have the stenographer reduce the same to writing for him and a copy for each of the parties plaintiff and defendant. And the cost thereof shall be taxed as other costs in the action. . . . After the argument shall have been concluded, the jury shall retire to consider their verdict, and shall take with them to the jury room, among other matters proper to be taken to their jury room for further consideration by them, the written charge given them by the court."

Section 395, Rem. & Bal. Code, relating to the record on appeal, provides that:

"All charges to a jury made wholly in writing, all instructions requested in writing to be given as part of a charge . . . shall be deemed and are hereby declared to become, upon being filed in the cause, or, as the case may be, embodied in a journal entry,—a part of the record in the cause, for all the purposes thereof and of any appeal therein; and it shall not be necessary or proper, for any purpose, to embody the same in any bill of exceptions or statement of facts."

Considering these sections together, it would seem that the requirement of § 339, that the charge be in writing, was intended to be mandatory. The purpose is three-fold: (1) to enable the jury to take with them to the jury room and have

for their guidance the exact written instructions of the trial judge upon all questions of law affecting the case; (2) to avoid any question during the argument of counsel, or deliberations of the jury, as to the law of the case; and (3) by filing the same, to make all written instructions a part of the record, without a statement of facts or a bill of exceptions.

In *State v. Marion*, 68 Wash. 675, 124 Pac. 125, a similar question was presented. There the oral instruction of which complaint was made did not state any rule of law applicable to the facts of the case. In holding no reversible error had been committed, we said:

"The statute provides that 'the court must reduce the charge to be given to the jury to writing, and at the conclusion of the evidence he shall read his written charge to the jury.' Rem. & Bal. Code, § 339, subd. 4. Appellant contends that the language of the court above quoted is a violation of this statutory provision. It is not claimed that the instructions upon the principles of law involved in the case were not given in writing. It is manifest that the court was not giving an instruction to the jury upon the principles of law, but was explaining orally what he had read. The explanation was in the interest of the accused. 'Only when the statements of the court amount to a positive direction as to the law of the case will such statements be regarded as an instruction within the meaning of the statute requiring instructions of the court to the jury to be in writing.' *Boggs v. United States*, 10 Okl. 424, 63 Pac. 969, 65 Pac. 927."

An examination of our opinion will show that we did not discuss or allude to § 395 *supra*, which provides that written instructions upon filing shall become a part of the record. We did hold, as shown by the above quotation, that the oral explanations of the trial judge, of which complaint was then made, were not instructions upon any principle of law applicable to the issues. We are not inclined to extend the rule there announced. It was within the law of this case that the jury should be instructed as to the proper rules by which they were to be governed in weighing evidence, in passing upon the credibility of witnesses, and in accepting

or rejecting their testimony. Respondent contends, that the oral instruction was not upon the law of the case; that in any event it was not erroneous; that no prejudice resulted; and that no reversible error was committed.

The difficulty with this contention is that it ignores the plain and positive mandate of the statute. If the statute may be ignored as to one oral instruction because it was not erroneous, then we would be compelled to ignore it as to every other oral instruction free from error, with the result that the entire body of the instructions might be orally given, provided they were free from error and correctly stated the law. The result of this would be that an appellant would be obliged to resort to a statement of facts or a bill of exceptions to make such instructions a part of the record, that the jury could not take the instructions to their jury room, and that § 339 would, for all practical purposes, become a dead letter by judicial repeal. Whenever the attention of a trial judge is directed to the fact that he may have omitted any written instruction which should be given, he can suspend proceedings until the omitted instruction is reduced to writing so that it may be read to the jury, and thereafter be taken to their jury room when they retire to deliberate upon their verdict. The oral evidence was in direct conflict in this action. It must have been necessary for the jury to reject, in part at least, that of some of the witnesses. It was required by the statute that they should have, in written form, the exact instructions of the trial court announcing the rule by which they were to be guided.

By the criminal code of Utah it was provided that the charge to the jury should be reduced to writing before given, unless by mutual consent of the parties it was given orally, that the jury when retiring might take with them the written instructions given; and that when written charges have been presented, given, or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the in-

dorsements showing the action of the court, form a part of the record, and any error on the decision of the court thereon may be taken advantage of on appeal in like manner as if presented in a bill of exceptions. In *Hopt v. People*, 104 U. S. 631, the court, in passing upon this statute, and upon oral instructions given without the consent of the defendant, said:

"The object of these provisions is to require all the instructions given by the judge to the jury to be reduced to writing and recorded, so that neither the jury, in deliberating upon the case, nor a court of error, upon exceptions or appeal, can have any doubt what those instructions were; and the giving, without the defendant's consent, of charges or instructions to the jury, which are not so reduced to writing and recorded, is error. *Feriter v. State*, 33 Ind. 283; *State of Missouri v. Cooper*, 45 Mo. 64; *People v. Sanford*, 43 Cal. 29; *Gile v. People*, 1 Col. 60; *State v. Potter*, 15 Kan. 302."

We have discussed this question at considerable length, for the reason that it is ordinarily the rule and intention of this court that no reversal shall be ordered for error not prejudicial. Yet we regard it as our duty to enforce the clear mandate of the statute by which the legislature has required all charges to be in writing, to be read to the jury, and to be taken with them to their jury room. The question of the wisdom of the statute was for the exclusive consideration of the legislature, and it is our duty to enforce it as written. The trial court erred in giving the oral instruction, and such error, much as we may regret it, requires a reversal of the judgment.

Respondent Mrs. Raynor had been pregnant for about two months prior to the date of the accident. There was evidence that she suffered a miscarriage as a result of her fall, that she was under treatment for months thereafter, and was compelled to undergo several surgical operations. The trial judge instructed the jury that, in assessing the damages, they were to take into consideration any pain and suffering

she had endured and would endure, and any impairment of health she had incurred as the result of her injuries. He further instructed them:

"You are also to take into consideration the pain and suffering and mental anguish which the plaintiff Mrs. Raynor suffered by reason of miscarriage, if you find from the evidence that she suffered a miscarriage by reason of the injuries received at the accident, and also you can take into consideration her impairment of health, if any, which resulted to her by reason of the miscarriage."

Upon the last instruction, appellants assign error, contending that, while the miscarriage may be considered as one of the elements of damage, it does not, in and of itself, afford ground for recovering separate and apart from the physical injuries, pain and suffering resulting from the accident as a whole. In other words, appellants seem to contend that, by the two instructions, the trial court authorized the jury to award double damages, first, for the pain, suffering and impairment of health, and second, additional damages for the miscarriage. They also contend that the latter instruction does not state the correct measure of damages. The instructions may not be in the best form, in that on causal examination they might be understood as authorizing double damages as appellants contend. But we think no such intention existed in the mind of the trial judge, and in the light of all the instructions given, are satisfied that the jury could not have so understood him. He simply wished the jury to understand that, in awarding damages for the pain, suffering and impairment of health, they might take the miscarriage into consideration, with its attendant results. Perhaps, by this separate instruction, he placed too much stress upon the fact of the miscarriage, but in the light of all the instructions, we fail to see that any prejudicial error resulted.

In support of their contention that the second instruction does not state the correct measure of damages, and that appellant cannot recover damages for pain, suffering and

mental anxiety incident to the miscarriage, appellants cite *Hawkins v. Front Street Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808. But the facts in that case are not similar to those here shown. There the delivery of the child, which was stillborn, occurred four months and ten days after the accident, the period of gestation having almost expired. Here the miscarriage occurred within a few days after the accident, and was attended with unusual pain, suffering and bodily injury. We do not think the instructions authorized double damages or announced any improper measure of damages relative to the facts proven. *Big Sandy & C. R. Co. v. Blankenship*, 133 Ky. 438, 118 S. W. 316, 23 L. R. A. (N. S.) 345.

Other assignments need not be considered, as they will not be material on a new trial. For the error above mentioned, the judgment is reversed, and the cause remanded for a new trial.

PARKER and GOSE, JJ., concur.

CHADWICK, J. (dissenting)—In so far as Judge Crow discusses and finds error in the fact that the trial judge orally instructed the jury as quoted in the majority opinion, I find myself unable to agree. The majority differentiates this case from that of *Purcell v. Warburton*, *ante* p. 129, 126 Pac. 89, because in that case the instruction was given in writing, while here it was given orally. The error in this reasoning lies in this, that if the statute is to receive the strict construction now put upon it, the time when the instruction is given is as important and quite as imperative as the manner in which it is delivered. In *Purcell v. Warburton*, the instruction was given after argument. Here it was given before argument, and every opportunity to discuss it in the light of the evidence was afforded counsel. It seems to me that, if it be error to orally state a proposition of substantive law, one not really going to the particular issues as defined by the pleadings, before argument, it should have

been held to be error to instruct upon a vital issue after argument; yet the only ground upon which the majority have rested its decision is, that in the *Purcell* case the instruction was in writing and here it was oral. Counsel was not deprived of the privilege of argument, and might have requested that the oral instruction be transcribed by the stenographer. This was not done. It is not contended that the statute is mandatory. Written instructions are frequently waived by counsel, and it is within the spirit of the statute, if not the letter, to hold that a failure to ask that an oral instruction, given before argument, be put in writing is a waiver of the statute. To hold the circumstance here presented to be sufficient ground for reversal is, in my judgment, a resort to technical reasoning, and contrary to the frequently announced policy of this court to disregard error unless it is probably prejudicial. It does not so appear in this case, and I find no hesitation in adopting the conclusion announced in the *Purcell* case as controlling here.

As for the instruction discussed in the majority opinion, I adopt the statement made by Judge Crow, but draw a different conclusion. I do not, and it is barely possible that some of the jurors could not, by reference to the instruction complained of, know that the trial judge "simply wished the jury to understand that, in awarding damages for the pain, suffering and impairment of health, they might take the miscarriage into consideration, with its attendant results." The instructions as a whole fairly call for double damages; or if not, it takes the closest reasoning of a skilled lawyer to show that they do not, and then only by reference to instructions that are not quoted. If the case was to be affirmed, it might do to pass the instruction, but so long as it is going back for a retrial, it should have been criticized. I hope, therefore, that, notwithstanding the merciful consideration of the instruction by this court, when the case comes on for trial it will be recast, making it plain and certain, to the end

that the defendants will feel, in the event of an adverse verdict, that they have had a fair trial upon correct legal principles.

[No. 10085. Department Two. September 7, 1912.]

In the Matter of the Receivership of the SPOKANE-COLUMBIA RIVER RAILROAD AND NAVIGATION COMPANY.[1]

RECEIVERS—COMPENSATION—AMOUNT. Where the gross receipts in a receivership were $14,779, an allowance of $3,600 for receiver's and attorney's fees will not be disturbed on appeal, where the evidence was conflicting and the allowance appears to be just.

Appeal from an order of the superior court for Spokane county, Yakey, J., entered May 20, 1911, upon findings in favor of the plaintiff, fixing a receiver's compensation, after a hearing before the court. Affirmed.

B. C. Mosby, for appellant.

Happy, Winfree & Hindman, for respondents.

PER CURIAM.—This is an appeal from an order fixing the compensation of a receiver. The only question presented is the compensation for receiver's and attorney's fees on final settlement of the receivership. The receiver was his own attorney. He appeals from the order.

The appellant demanded $10,000. The trial court allowed $3,600. The gross receipts of the receivership from all sources amounted to $14,779.68. The evidence of witnesses to the value of the services performed was conflicting. After reading the record, we conclude that the allowance made was liberal and should not be disturbed.

The judgment is therefore affirmed.

[1]Reported in 126 Pac. 418.

[No. 10077. Department One. September 7, 1912.]

MARY DELASKI *et al.*, *Respondents*, v. NORTHWESTERN IMPROVEMENT COMPANY *et al.*, *Appellants*.[1]

TRIAL—NONSUIT—CREDIBILITY OF WITNESS—QUESTION FOR JURY. Where on a former appeal, on substantially the same evidence, the supreme court upheld the sufficiency of the evidence to sustain a recovery, the fact that the testimony of one witness in the second trial varied on immaterial issues from his former testimony, does not warrant a nonsuit, where the contradictions merely affected his credibility and it was for the jury to determine the credit to be given to his testimony.

MASTER AND SERVANT—INJURIES TO SERVANT—SAFE PLACE—MINES—EVIDENCE—ADMISSIBILITY. In an action for the death of a coal miner poisoned by gases in a room on the 10th level on the west side of the mine, it is not error to admit evidence that the air was frequently bad on the 9th level on the east side of the mine, although that place was not in issue, where there was evidence that there was a passageway whereby the air could pass from the one place to the other, and where evidence of frequent bad air throughout the mine also supported the allegation that the rules of the company were frequently violated by shooting blasts at the noon hour; especially where the court cautioned the jury that the general system of ventilation was not complained of as defective and that the only issue was as to insufficient ventilation of the particular room.

DEATH—ACTION FOR WRONGFUL DEATH—EXCESSIVE VERDICT. A verdict for $18,000, in favor of a widow and children, for the death of a coal miner, from 35 to 37 years of age, in good health and able to earn about $65 a month, and having a life expectancy of thirty years, is excessive and should be reversed unless $4,000 is remitted.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered July 24, 1911, upon the verdict of a jury rendered in favor of the plaintiffs for $18,000, for the wrongful death of an employee in a coal mine. Reversed, unless $4,000 is remitted.

C. H. Winders, for appellants.

William R. Bell, for respondents.

[1]Reported in 126 Pac. 421.

Crow, J.—This action, which was commenced by the widow and minor children of John Delaski, deceased, to recover damages for his wrongful death, has heretofore been in this court on plaintiffs' appeal. A judgment of nonsuit and dismissal was then reversed, and the cause was remanded for a new trial. A complete statement of the issues may be found in our former opinion (*Delaski v. Northwestern Imp. Co.*, 61 Wash. 255, 112 Pac. 341). After remittitur, the cause was again tried. The jury returned a verdict for $18,000 against the defendants Northwestern Improvement Company and William Farrington, who now prosecute this appeal.

Appellants' first contention is that the trial court erred in denying their motion for a nonsuit and their challenge to the sufficiency of the evidence. The record is practically the same as that presented on the former appeal. Appellants contend that the evidence of John Delaski, Jr., son of the deceased, contradicts that which he gave on the former trial. To some extent this is probably true, but a considerable period of time elapsed between the two trials. The points on which the variance appears do not weaken his evidence as to controlling issues. Not only did appellants cross-examine him on all these points of variance, but they also introduced his former evidence. Any contradictions thus shown might, to some extent, affect his credibility, but it was for the jury to determine whether they would credit him. They have seen fit to do so. His evidence and that of other witnesses was sufficient to sustain a verdict in respondents' favor. We have carefully read the entire record and conclude that appellants place too much stress upon the contradictions to which they refer.

As to material issues, we fail to note any very considerable inconsistency. It is common experience that witnesses cannot, at different times, give an identical narration of incidents which they have observed and seen. Appellants have emphasized selected portions of the evidence to show the con-

tradictions of which they now complain. Yet the credibility of the witness was for the jury, and it would certainly be a novel doctrine for an appellate court to hold that it would reject the evidence of a witness because of contradictory statements made at different times, and with such evidence eliminated, order a nonsuit or a directed verdict. Such a course would be an unwarranted invasion of the exclusive province of the jury. It is possible that the jury were satisfied that the latter statements of the witness were true, and that he was mistaken or at fault in his recollection on the former trial. The evidence on this trial produced by respondents was as convincing as that presented on the former appeal, when we held it was error to grant a nonsuit. Appellants' motion for an nonsuit and challenge to the sufficiency of the evidence were properly denied.

Appellants contend the trial court erred in the admission of evidence. They insist that neither the general system of ventilation adopted in the mine nor the condition of the air, except on the tenth level, was in issue. Certain witnesses were permitted to testify that other men had been taken out of the mine, and that the air was bad on the ninth level on the east side of the mine, and also on the west side on levels other than the tenth where the deceased was working. Appellants, while conceding that much of this evidence was stricken, insist that it was all incompetent and prejudicial; that the east and west sides of the mine were not connected; that the air could not pass from the one to the other; and that on the west side the air on lower levels did not pass to the tenth level where the deceased was working. The difficulty with these contentions is that statements of the witnesses whose testimony was not stricken were to the effect that there was a passageway between the east and west mines, and that on the west side the air did pass from the lower to the upper levels. It is true that appellants offered evidence to the contrary, but it was for the jury to determine the truth. Respondents alleged that rules of the appellant corporation

were repeatedly violated by the shooting of blasts at the noon hour. Frequent bad air throughout the mine would tend to sustain this allegation, which was also supported by the testimony of John Delaski and one or two other witnesses.

The trial court instructed the jury:

"There is no complaint in this case, gentlemen of the jury, that the general system of ventilation in this mine was defective. The only charge is that by reason of their failure to have a crosscut running into room 14 where the deceased was working, and by reason of their having insufficient brattices at the entry to the room, and by reason of their having driven the breast too far from the entry, that there was insufficient ventilation in this particular room. Those are facts for you to determine in this case; but, as I have said, of the general system of ventilation there is no complaint made in this case."

In view of this instruction, and the further fact that all incompetent evidence was stricken, we are unable to conclude that prejudicial error was committed by the trial judge in his rulings upon the admissibility of evidence.

Appellants assign error on instructions given and refused. The instructions given fairly stated the law and covered all requested instructions which should have been given, with such modifications as were proper. We have carefully read the entire body of the instructions and conclude that they are free from error.

By their remaining assignment, appellants contend the verdict is excessive. While we hesitate to disturb the verdict of a jury awarding damages for personal injuries, we are compelled in this action to hold that this contention must be sustained. It is the peculiar province of the jury to determine the amount of damages to be awarded, but it is elementary that compensation only can be permitted. John Delaski was about thirty-five to thirty-seven years of age, and had been working as a coal miner for many years. He had met with three accidents on previous occasions. In one his shoulder blade was broken, in another his jaw was

broken, and in the third he was severely burned by a gas explosion. Yet he was in good health and able to earn about $65 per month. Ignoring his dangerous occupation and previous injuries, his life expectancy would have been about thirty years. Had he lived that entire period, with the same earning capacity, his entire wages could not have exceeded $22,400, from which he would have provided support for himself and family. It is not shown that he had accumulated any property or estate. The judgment of $18,000 invested at six per cent interest would produce $1,080 per annum, which would be $300 in excess of his yearly earning capacity. Yet in such an investment, after receiving the benefit of the interest thus earned, the principal would remain intact. It is manifest that the verdict is in excess of reasonable compensation. On consideration of all the evidence, we are constrained to hold that no recovery in excess of $14,000 should be permitted. This cause has been tried three times. There should be an end of litigation. A new trial will not be granted except at the election of respondents. If within thirty days after remittitur respondents file with the clerk of the superior court their written election to remit all of the judgment in excess of $14,000 with six per cent interest thereon from the date of the last trial, the judgment as thus reduced will stand affirmed. Otherwise a new trial will be ordered. Appellants will recover their costs in this court.

PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 10417. Department One. September 7, 1912.]

OREGON AND WASHINGTON RAILROAD COMPANY, *Appellant*, v. ELLIOTT BAY MILL & LUMBER COMPANY *et al.*, *Respondents*, DUNGENESS LOGGING COMPANY, *Intervener and Respondent*.[1]

LANDLORD AND TENANT—ACTION FOR RENTS—MODIFICATION OF LEASE—EVIDENCE—SUFFICIENCY. A finding that a lease was modified by an oral agreement to allow the lessee to pay rent to a third party, and to remain in possession without payment of rent pending the termination of litigation between the lessor and the third party, will not be disturbed where the evidence is conflicting and the lessee was corroborated by the fact that the lessor continuously refrained from demanding and collecting the rentals, which were paid to the third party, and that the litigation had not been finally determined.

FRAUDS, STATUTE OF—ORAL MODIFICATION OF WRITTEN LEASE—PART PERFORMANCE. The rule that an oral modification of a written lease is void has no application, where it appears that the oral agreement was partially performed by allowing the lessee to remain in possession and pay rent to a third party pending the termination of litigation between the lessor and the third party, and that the lessor subsequently recognized it by forbearance in neither demanding nor collecting rent.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 26, 1911, in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for unlawful detainer. Affirmed.

Bogle, Graves, Merritt & Bogle, for appellant.

Bostwick & Steele and *Preston & Thorgrimson*, for respondents.

CROW, J.—On March 1, 1909, the Oregon & Washington Railroad Company, a corporation, leased to the Elliott Bay Mill & Lumber Company, a corporation, certain tide land

[1]Reported in 126 Pac. 406.

lots in the city of Seattle, with machinery and improvements thereon, for the term of five years, at the rental of $175 per month for the first year and $200 per month thereafter, rentals payable monthly in advance. At that time the railroad company claimed an interest in the land under a lease from the state of Washington for a longer term, which had been assigned to it. The Elliott Bay Mill & Lumber Company, as lessee, entered into possession and paid all rent due to December 1, 1909, inclusive, but made no further payments. This action of unlawful detainer was commenced in February, 1911, by the railroad company against the lessee and Elliott Bay Lumber Company, a corporation, to recover possession. Thereafter the Dungeness Logging Company, a corporation, intervened, pleading three certain mortgages executed to it by the lessee or its successor on the leasehold estate, improvements, and machinery, and upon certain lumber or logs. On trial the action was dismissed. The plaintiff has appealed.

The following facts appear from the pleadings and evidence: After the execution of the lease above mentioned, to wit, on November 29, 1909, the state of Washington executed and delivered to George Kinnear, Gertrude F. Brawley, and Ella R. Brawley a deed for the tide lands covered by the lease. Immediately thereafter, Kinnear and the Brawleys notified the Elliott Bay Mill & Lumber Company that it must pay rent to them or surrender possession. The controlling and disputed question of fact is whether a valid modification of its original lease as to payment of rent was then made by appellant. Respondents contend that, after the demand of Kinnear and the Brawleys, the Elliott Bay Mill & Lumber Company applied to appellant railroad company for some relief; that in substance the railroad company then agreed that the mill company might pay rent to Kinnear and the Brawleys until certain pending and contemplated litigation between the railroad company and Kinnear and the Brawleys, relative to the rights of the railroad company predicated on

former leases from the state, should be finally adjudicated and determined; that if such litigation should be determined in favor of the railroad company, the mill company should then pay to the railroad company all rentals then past due, and all future rentals according to the terms of its lease from the railroad company, but that until such final adjudication the mill company should suspend payments to the railroad company and should be permitted to make payments to Kinnear and the Brawleys, the mill company thus assuming the risk of making a second payment to appellant; that in accordance with this agreement, the mill company did pay rentals to Kinnear and the Brawleys, who executed and delivered a fifteen-year lease to Arthur Gerbel and R. O. Reed, officers and stockholders of the mill company, and that Gerbel and Reed permitted the mill company to remain in possession. While the mill company was thus in possession under the Gerbel and Reed lease, the intervener, Dungeness Logging Company, acquired its mortgage liens without notice or knowledge of the appellant railroad company's alleged interests. The railroad company had not at that time recorded the lease executed by it to the mill company, nor was it then collecting rents.

The trial judge orally announced his finding that the subsequent contract thus modifying the terms of the original lease from the railroad company to the mill company was made as contended by respondents. Formal written findings were waived by the parties and none were entered. The controlling question before us is whether the evidence sustains the finding thus orally announced. Although the evidence is conflicting we are clearly of the opinion that it preponderates in favor of, and does sustain, the findings and the final judgment. It is undisputed that, for a full year after the making of the alleged contract of modification, the appellant railroad company refrained continuously from demanding or collecting rentals from the mill company under its lease, that during all that time the respondent mill company paid

rentals to Kinnear and the Brawleys, and that it was not shown that the litigation between appellant and Kinnear and the Brawleys has been finally determined. The circumstances and facts all corroborate the contention of respondents.

Some contention is made by appellant to the effect that the contract of modification is void because it was oral, that the original lease was required by law to be in writing, and that any contract of modification to be valid should also be in writing. There were written memoranda of the modification contract, not executed by all the parties. Conceding the contract to have been entirely oral, it clearly appears that it had been partially performed, that respondents ceased paying rent to appellant, and that they did pay to Kinnear and the Brawleys, by whom they were then permitted to remain in possession, a concession which otherwise would not have been made. As the oral modification contract has been partially performed and was recognized by subsequent forbearance of the appellant railroad company, in that it neither demanded nor collected rents, the rule for which appellant now contends can have no application to the facts before us. In *Gerard-Fillio Co. v. McNair*, 68 Wash. 321, 123 Pac. 462, we said:

"While it is the rule that a written executory agreement to sell or purchase real estate cannot be rescinded or abrogated by an oral executory agreement to rescind or abrogate, it does not follow that such an agreement cannot be modified or abrogated by an executed oral agreement. On the contrary, it is recognized by our own cases above cited, and it is the rule of all the cases in so far as we are advised, that an executed oral contract to modify or abrogate a written contract required by statute to be in writing, can be successfully pleaded as a defense to an action on the original contract. To hold otherwise is to make the statute of frauds an instrument of fraud; for it would be a fraud to allow a person to enforce a contract which he had agreed on sufficient consideration to modify or abrogate after he has accepted the consideration for its modification or abrogation. It is for this reason that equity allows a performance or a substantial part performance of a contract, invalid because not

in writing, modifying or abrogating a valid contract to be pleaded as a defense to an action on the valid contract. To do otherwise would be to allow one of the parties to have the benefit of both contracts when in equity and good conscience he should have the benefit of but one."

Further questions raised by appellant we find to be without merit. The controlling issue, one of fact, was rightfully resolved in respondents' favor. The judgment is affirmed.

PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 10007. Department One. September 7, 1912.]

N. J. MOREHOUSE, *Appellant*, v. CLERK OF THE CITY OF EDMONDS *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ACCEPTANCE OF WORK—CONCLUSIVENESS. The failure of a city contractor to pay into a local improvement fund the amount of fixed charges, and to mix concrete by hand, as required by his contract, will not prevent recovery for the work on completion of the same, where the city engineer who had supervision of the work permitted mixing by a machine, and the governing body authorized by the contract accepted the work when completed; such acceptance being conclusive and a valid waiver of strict compliance with the contract.

SAME—ACCEPTANCE OF WORK. Acceptance of public work by a "street committee" of the city council, required by the contract, is dispensed with by an independent acceptance by the city council which created the committee.

SAME—ACCEPTANCE—ENGINEER'S CERTIFICATE—WITHHOLDING. A city engineer, made by contract the judge of when the work is completed, cannot arbitrarily and capriciously refuse to accept a public improvement, or withhold his certificate because the contractor refused to bear the burden of the former's errors.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 19, 1911, upon granting a nonsuit, in an action on contract. Reversed.

[1]Reported in 126 Pac. 419.

Vince H. Faben, for appellant.

G. D. Eveland and *S. J. White*, for respondents.

Gose, J.—This is a suit to recover an alleged balance due upon a street improvement contract. At the close of the plaintiff's testimony, the case was withdrawn from the jury and a judgment of dismissal and for costs was entered. Plaintiff prosecutes the appeal.

The contract provides, that the improvement shall be made under the superintendence of the street committee of the city council and subject to its acceptance and approval; that the improvement shall not be deemed completed until the city council shall have filed with the city clerk a statement, signed by a majority of them, to the effect that it has been completed; that

"No bonds or warrants shall be issued in any event for any part of said thirty (30) per cent so reserved until said party of the second part shall have filed with the city clerk a certificate signed by the city engineer stating that said period of thirty days has elapsed and no uncompleted or defective work has been discovered for which the city makes claim; nor until the contractor shall have purchased the bonds issued to cover the cost of list of owners, engineering and advertising to the amount of the fixed estimate, and shall have paid the par value thereof, in coin, into said local improvement fund, district No. 14, in the city treasury. It is hereby expressly provided that any warrants which shall be issued to the contractor in the amount of eight hundred and no-100 dollars, in payment of the fixed estimate for list of owners, engineering and advertising expenses incident to this improvement shall be by him properly endorsed, made payable to, and delivered to the city clerk for the transfer by him to the proper funds to meet said expenses, and the contractor for this improvement shall have no claim to any portion of the warrants issued in payment of said fixed estimate, except to endorse and deliver them as herein provided."

The specifications, which were expressly made a part of the contract, provide that the concrete shall be mixed by hand labor, that the city engineer may make such alterations

of the original plans as he shall deem necessary, and that the improvement shall be made under his superintendence. The complaint alleges, that the appellant has fully performed the contract on his part; that after the completion of the work, the improvement was approved by the city engineer, and accepted as completed by the city council; that the city council has arbitrarily and capriciously failed and refused to file with the city clerk a statement signed by the majority of them declaring that the improvement has been completed; and that the city engineer has arbitrarily and capriciously refused to issue to the appellant his certificate stating that the period of thirty days has elapsed and that the city has no claim for uncompleted or defective work. It is further alleged that there are no liens or charges against either the appellant or respondent or the improvement. These matters are traversed by the reply.

The respondent is a city of the third class, and its government is vested in a mayor and city council composed of seven members. Rem. & Bal. Code, § 7672. The minute book of the city shows that, on December 7, 1910, at a regular meeting of the council, the improvement was "accepted on report of the city engineer of its final completion," and that the minute was read and approved at a regular meeting of the council on December 21. The parol testimony is that the city engineer was present at the meeting of December 7 and recommended the acceptance of the improvement; that later the incoming mayor appointed the city council "as a committee of the whole" to go with the appellant and the city engineer and inspect the work and report their findings; that they did inspect it in the presence of such parties and a Mr. Stebbins who had been inspector for the city while the work was in progress, and that each member of the council then signed a certificate stating that the improvement was accepted. Other witnesses said that the acceptance was signed by a majority of the council and a majority of the street committee. This acceptance was presented to the city coun-

cil at its next meeting, and was thereafter, upon motion, withdrawn and the committee was discharged. The demand of the appellant for the filing of a certificate signed by a majority of the council and for the issuance of a certificate by the city engineer was refused.

The respondent contends that there can be no recovery, (1) because of the failure of the appellant to pay the amount of the fixed charges into the local improvement fund for the redemption of the warrants, as provided in the contract; (2) because the evidence shows that the concrete was mixed by a machine instead of by hand labor; (3) because the improvement was not accepted by the street committee; and (4) because the evidence is not clear and convincing that the city engineer acted arbitrarily or capriciously or in bad faith.

The first two contentions will be considered together. It is well settled that, in the absence of fraud, an acceptance of a public improvement by the governing body or by the party authorized by the charter, ordinance, or contract to accept it, is conclusive upon both parties. 1 Abbott, Municipal Corporations, § 288; *Lake Erie & W. R. Co. v. Walters*, 13 Ind. App. 275, 41 N. E. 465; *Whitefield v. Hipple*, 11 Ky. Law 386, 12 S. W. 150; *Atkinson v. Davenport*, 117 Iowa 687, 84 N. W. 689; *Central Bitulithic Paving Co. v. Mt. Clemens*, 143 Mich. 259, 106 N. W. 888; *City Street Imp. Co. v. Marysville*, 155 Cal. 419, 101 Pac. 308, 23 L. R. A. (N. S.) 317. The respondent had the right and power to waive a strict compliance with the terms of the contract. *Lake Erie & W. R. Co. v. Walters, supra; Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 70 Am. St. 472, 43 L. R. A. 678; 28 Cyc. 1054k.

The respondent has cited *De Mattos v. Jordan*, 20 Wash. 315, 55 Pac. 118, and *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393. In the *De Mattos* case the single question involved was whether an oral approval of the work by the architect was sufficient. It was held that the contract contemplated that his written certificate should be obtained prior to the

commencement of the action. In the *Atwood* case it was held that the change made in the work by the engineer was so radical that it was in excess of his powers.

The evidence shows that the cement was mixed in a machine designed for that purpose, and that it is a better and more modern method than hand mixing. The area of the work was small, and the inspector employed by the city was giving his entire attention to a supervision of the work. The method of mixing the cement was apparent to both the inspector and the engineer, and a reasonable attention to their duties required them to reject the concrete before it became a part of the solid body of the improvement if the method of mixing was not satisfactory. Their failure to do so was clearly an acquiescence in the method pursued.

The third contention is equally wanting in merit. The "street committee of the city council," as it is called in the contract, was appointed by the council for its own convenience. Obviously the body that created it could either disregard it or act independently of it.

In respect to the last contention, it suffices to say that we have uniformly held that it is the duty of an architect or an engineer who has been selected by the parties to a contract to determine when the contract has been completed, to exercise his honest judgment on the matters submitted to him. He cannot arbitrarily, or capriciously, or in bad faith, refuse to certify to the truth, and thus prevent a party from having the compensation which he has earned. *Craig v. Geddis*, 4 Wash. 390, 30 Pac. 396; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790; *School District No. 5 v. Sage*, 13 Wash. 352, 43 Pac. 341; *McKivor v. Savage*, 60 Wash. 135, 110 Pac. 811; *Skagit County v. Trowbridge*, 25 Wash. 140, 64 Pac. 901.

The evidence tends strongly to show that the engineer withheld his certificate because the appellant refused to bear the burden of the former's errors.

For the reasons stated, the court was in error in withdrawing the case from the jury. Reversed.

MOUNT, CHADWICK, PARKER, and CROW, JJ., concur.

[No. 10296. Department Two. September 9, 1912.]

J. C. DORE, *Respondent*, v. R. P. JONES *et al.*, *Appellants*.[1]

BROKERS—COMMISSIONS—PERFORMANCE OF CONTRACT—EVIDENCE—SUFFICIENCY. The fact that a broker first introduced a prospective purchaser, after which he did not purchase, knowing that it was also listed with another broker, does not establish that he earned the agreed upon commissions, where it appears that for several days previously the purchaser had been looking for property with the other broker, who subsequently showed the property, made the sale and received the commissions; since the latter's efforts were the efficient cause of the sale.

Appeal from a judgment of the superior court for Spokane county, Yakey, J., entered June 20, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover a broker's commission. Reversed.

Davis & Rhodes, for appellants.

L. H. Prather, for respondent.

MOUNT, J.—This action was brought by the plaintiff, who was a real estate agent, to recover a commission upon an alleged sale of real estate. The defendants admitted that the property was listed with the plaintiff for sale, but denied that it was sold by the plaintiff. This was the principal issue upon the trial. The case was tried to the court and a jury. At the close of the evidence, the defendants moved the court for a directed verdict. This motion was denied, and a verdict was subsequently returned in favor of the plaintiff for $250, upon which verdict a judgment was entered. The defendants have appealed.

[1]Reported in 126 Pac. 413.

Several errors are assigned, based upon the denial of the motion for a directed verdict, and also on certain instructions. It was admitted that the plaintiff and the defendants entered into the following contract:

"Spokane, Washington, January 3, 1910.

"I hereby list with J. C. Dore till notified in writing to the contrary my property described as follows: (Then follows description.) This listing void after thirty days from date. My price is $6,000. My terms are cash. If sold by J. C. Dore I agree to pay a commission equal to $250, payable in cash at the time transfer is made. Commissions two hundred and fifty dollars.

"Jones & Mollendorf, by R. P. Jones."

The same property was already listed with other real estate agents, and this fact was known to the plaintiff. At the time the contract was entered into, the plaintiff told the defendants that he had a purchaser for just such property, and he took Mr. Mollendorf to see the purchaser, but the purchaser was not at home. Arrangements were then made by which Mr. Mollendorf might meet the purchaser on the following morning. Mr. Mollendorf, in accordance with this arrangement, met the prospective purchaser, and she appeared favorably disposed toward the property and promised to look at it that same day. It appears that, for several days previously, she had been looking for a suitable purchase, in company with another real estate agent, a Mr. Wilson, who was a salesman for Grinnell & Company, with whom the same property was listed. This prospective purchaser later came with Mr. Wilson, examined the property, and subsequently purchased it through the efforts of Mr. Wilson, and the agreed commission of $250 was paid by the defendants to Grinnell & Company. When Mr. Mollendorf saw that the purchaser was in company with Mr. Wilson who was endeavoring to make the sale, he at once notified the plaintiff of that fact. This is the substance of the testimony.

The plaintiff first introduced the prospective purchaser to defendants, but he did nothing more. It was conclusively shown that Mr. Wilson, of the firm of Grinnell & Company, was the efficient cause of the sale, and there is no claim, or at least no evidence, that the defendants acted in bad faith with the plaintiff. The mere fact that the plaintiff first introduced the purchaser to the defendants is not a compliance with the contract to sell, where it is shown that the sale is made and closed by another agent with whom the property is also listed. In *Frink v. Gilbert*, 53 Wash. 392, 101 Pac. 1088, we said:

"Where several brokers have the same property listed for sale, although each has contributed towards the result, the one whose effort was the efficient cause of the sale is entitled to recover the commission. The leading case upon this subject, and one most frequently cited and relied upon by the courts, is that of *Vreeland v. Vetterlein*, 33 N. J. 247, where the court said: 'Where the property is openly put in the hands of more than one broker, each of such agents is aware that he is subject to the arts and chances of competition. If he finds a person who is likely to buy, and quits him without having effected a sale, he is aware that he runs the risk of such person falling under the influence of his competitor—and in such case he may lose his labor. This is a part of the inevitable risk of the business he has undertaken. . . . . Now in this competition, the vendor of the property is to remain neutral; he is interested only in the result. But when either of the agents thus employed brings a purchaser to him, and a bargain is struck at the required price, on what ground can he refuse to complete the bargain? Can he say to the successful competitor, this purchaser was first approached by your rival, and you should have refused to treat with him on the subject? There is no legal principle upon which such a position could rest. . . . And if, therefore, it should be known to the vendor of the property that the agent, who introduces a purchaser to him has, by the usual arts of competition, taken such purchaser out of the hands of his rival, I am not aware of anything in the law which would justify such vendor in a refusal to complete the contract. . . . In the absence of all collusion on the part

of the vendor, the agent, through whose instrumentality the sale is carried to completion, is entitled to the commissions.' "

This is conclusive of the case, for here the plaintiff did nothing more than introduce the prospective purchaser to the defendants. He did not even show her the property. She was in charge of a rival agent, who showed her the property and actually made the sale and received the commission. On these facts, the court should have directed a verdict for the defendants. The judgment is therefore reversed, and the cause ordered dismissed.

FULLERTON, ELLIS, MORRIS, and GOSE, JJ., concur.

[No. 10365. Department Two. September 9, 1912.]

JAMES CONNOLLY, *Respondent*, v. THE CITY OF SPOKANE, *Appellant*.[1]

MUNICIPAL CORPORATIONS—CLAIMS—NOTICE OF INJURY—STATUTORY PROVISIONS. Where a city ordinance provided that claims for personal injuries by reason of the city's negligence must be presented within thirty days, and that if the injury was caused by the existence of snow or ice or by reason of such place being out of repair, unsafe, or obstructed, the first provision relates to continuous negligence which the city could have provided against, and the latter provision refers only to temporary and quickly changing conditions; and hence thirty days is allowed for notice of an injury by reason of trapdoors being left partially open in a place where pedestrians "usually and continuously passed to and fro and over and in so passing walked continuously over and across said doors."

SAME—STREETS—INJURY TO PEDESTRIANS—TRAPDOORS. A city is liable for injuries received by a pedestrian by reason of partially open trapdoors, maintained in a sidewalk where persons were continuously passing over them, and which were either not in good repair, or which were opened without warning or guarding the place.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered November 9, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an

[1]Reported in 126 Pac. 407.

action for personal injuries sustained through stepping upon a trapdoor. Affirmed.

A. M. Craven and *Wm. E. Richardson*, for appellant.

O. C. Moore and *F. E. Langford*, for respondent.

MOUNT, J.—The plaintiff recovered a judgment against the city of Spokane by reason of an injury caused to him by stepping upon a trapdoor covering an open area way in the sidewalk. The city has appealed, and argues that the trial court erred in overruling a demurrer to the complaint, and in refusing to grant a nonsuit or directed verdict for the defendant. The demurrer was based upon the grounds that the plaintiff's claim against the city was not filed within the time limited by the city charter, and also that no actionable negligence against the city was averred. The complaint shows that the injury occurred on February 27, 1911, and that a claim against the city was filed on March 25, 1911. The city charter provides as follows:

"All persons having claims for damages for personal injuries or for injuries to property sustained by reason of alleged negligence or any act of the city . . . must present such claims to the council within thirty days after such injury or damage. They must be in writing and verified. . . . If any injury is alleged to have been caused by the existence of snow or ice on any street, highway, bridge, culvert, crosswalk or other public place, or by reason of any such place being out of repair, unsafe, dangerous or obstructed from any cause or in any manner, the claim for any such alleged damage or injury must be filed with the clerk within ten days after the date of such injury or damage." Charter, Spokane, art. 12, § 115.

This charter provision became effective on March 14, 1911, and the claim was filed on March 25, more than ten days thereafter. It is argued by the appellant that the action was barred because the claim was not filed within ten days after the charter provision became effective. We have held that

provisions of this kind to be valid must be fair and reasonable. *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383; *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938; *Wurster v. Seattle*, 51 Wash. 654, 100 Pac. 143.

If we assume, for the purpose of this case, that a ten-days' limitation is reasonable as applied to the conditions stated in the charter, it is plain that such provision should not be construed to apply to cases which do not clearly fall within the terms expressed, or be applied to cases where a doubt of the application exists; for to apply the provision to cases not clearly within the ten-days' provision would make it a snare and a trap, and therefore unfair and unreasonable. The first part of this section of the charter provides that claims for personal injuries sustained by reason of the alleged negligence of the city may be presented within thirty days. The latter part of the section provides that, if any injury is alleged to have been caused by the existence of snow or ice on any street, etc., or by reason of such place being out of repair, the claim must be filed within ten days. This latter provision refers to the temporary and quickly changing conditions of the places named, while the former provision refers to a continuous negligence which might have been foreseen. The complaint in this case, after describing the place and the iron doors covering the area way in the sidewalk, alleged that the place was one,

"where pedestrians usually and continuously passed to and fro, and in so passing walked continuously over and across said doors; that . . . through the negligence and carelessness of the defendant city said door was allowed to be and remain partially open and in an unsafe and dangerous condition, and this plaintiff then and there had occasion to pass and was passing and walking over and along that portion of said sidewalk, and while walking on and along said sidewalk, as he lawfully might and in the exercise of due care, stepped into and caught his right foot and leg in the opening caused by the out-of-repair and partially opened condition of said door," etc.

It seems plain that this allegation brought the case within the provision giving thirty days' time within which to file the claim; or, at least, does not plainly bring the case within the shorter period, and therefore the action should not be held to be barred.

The appellant next argues that the complaint does not state any actionable negligence, and also that the evidence was insufficient to show that the city had notice of the condition of the trapdoor, and for that reason the court should have directed a verdict for the defendant. The evidence showed that the trapdoors were maintained in the sidewalk where pedestrians were continually passing over the doors, which were not in good repair, for when walked upon, they were not solid. The plaintiff was unable to state just what occurred when he stepped upon one of the doors. Either it sank down with his weight, or some one beneath, without warning or guarding the place, at that moment raised the other door, which caught him and caused his injury. In either event the city was liable. In *Hayes v. Seattle*, 43 Wash. 500, 86 Pac. 852, 117 Am. St. 1062, 7 L. R. A. (N. S.) 424, which was a case substantially like this, we said, in referring to the same contentions now made:

"But we think these contentions inapplicable to the facts as shown in the record. This opening was upon a prominent thoroughfare, in constant use by pedestrians. The opening was not guarded in any way, and to open it at all was a menace to every person who happened at that time to be passing. These facts the city knew or ought to have known, and we think the court rightly held it responsible for the injury."

We find no error. The judgment is therefore affirmed.

ELLIS and FULLERTON, JJ., concur.

[No. 10342. Department Two. September 10, 1912.]

A. M. MEIGS, *Respondent*, v. JOHN PORTER *et al.*, *Appellants*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—SAFE PLACE—DUTY TO WARN—QUESTION FOR JURY. In ordering a servant into a dangerous place to remove a piece of iron suspending a heavy tank which was being lowered by a derrick to a car, the master owes the imperative duty to warn the servant of the removal of a rope holding the tank, rendering the work unnecessarily dangerous; and it was for the jury to determine whether the master was guilty of negligence in failing to keep the place safe, or give warning of impending danger by the removal of the rope, where the evidence was conflicting as to whether the servant had notice, and showed that no one would have been injured if the tank had been lowered by the rope after removal of the iron, as was the intention from the beginning.

SAME—ASSUMPTION OF RISKS—OBEDIENCE TO ORDERS. In such case, the servant does not assume the risks in obeying the order if the rope was not removed when he went into the place to work.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $3,000, reduced by the trial court to $1,500, in favor of a carpenter 42 years of age for injuries to a foot, will not be reduced as excessive, where he was confined to his bed six weeks, and used crutches for some time, and was still lame and was suffering much pain six months after the injury, and the prospect for a complete recovery was reduced by his age.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 6, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee assisting in moving an iron water tank. Affirmed.

Cannon, Ferris & Swan and *John B. White*, for appellants.

John M. Gleeson, for respondent.

ELLIS, J.—This appeal is prosecuted by the defendants from a judgment rendered upon the verdict of a jury in

[1]Reported in 126 Pac. 411.

favor of the plaintiff, for damages for personal injuries suffered by him while in the defendants' service, which injuries he claims were caused by their negligence.

The testimony introduced on behalf of the plaintiff tended to establish the following facts. The plaintiff, an experienced carpenter, forty-two years of age, was employed in repairing cars in the defendants' railroad construction works. Upon the day of the accident, the defendants were placing in position upon a steam shovel car an iron water tank about two feet wide, six feet high, and ten feet long, weighing about 1,200 pounds. There was a vestibule at the end of the car. The engine and boiler of the steam shovel were in position on the car immediately in front of this vestibule. The space for the water tank was on the left of the engine and boiler, and the tank had to be lowered from above edgewise into this space so that it, with the engine and boiler, would occupy practically the whole cross-section of the car immediately in front of the vestibule for a height of about six feet. The roof and sides of the car had been removed, save the side framework. There was a heavy wooden door, swung with hinges from the top, which when down covered the front of the vestibule. At the time in question, this was raised and laid back over the top of the vestibule, forming a roof over that part of the car. The tank was being lowered by means of a steam derrick placed near the car, a strong rope having been placed about the tank, which was thus pendant from the boom of the derrick. The work was being personally directed by the engineer, who was also foreman in charge of the works, with full power to hire and discharge men.

When the foreman was ready to install the tank, the plaintiff, by the foreman's direction, was called from his work in the car shop to assist in placing the tank. The foreman himself had charge of and operated the steam derrick. When the tank, by means of the rope and boom, had been swung above the car and lowered through the open roof into its narrow space beside the engine, it caught upon a projecting

piece of scrap iron or a lug riveted to the side of the boiler, so that the end nearest the vestibule hung about two feet (defendants' witnesses testified five or six inches) above the floor of the car, while the other end rested upon the floor. The foreman directed the plaintiff and another man to get upon the floor of the vestibule and with a crowbar knock off the piece of iron from the side of the boiler so that the tank could settle into its place. In compliance with this order, the plaintiff took the crowbar and loosened the piece of iron from the boiler, when the heavy tank fell upon the crowbar causing it to strike the plaintiff's foot, inflicting the injury complained of. There was very little dispute as to these facts, and we think they were clearly established by the evidence as a whole.

The appellants contend that they were guilty of no negligence. The negligence charged is that the appellants, through their foreman, relaxed the rope by which the water tank was suspended without warning to the plaintiff, so that, when released from the impeding piece of iron, the tank fell, causing the injury. This presents the only seriously controverted question of fact. The evidence plainly establishes the fact that the rope was removed from about the tank before the respondent knocked the iron lug from the side of the boiler. The foreman testified that he caused the rope to be removed before ordering the respondent to loosen the iron. The respondent testified positively that at that time the rope had not been loosened, and that he supposed that the rope was still on when he removed the iron. No one testified that he was warned of the removal of the rope. It is argued that if he had looked he would have seen that the rope had been removed, but he testified that the door lying over the top of the vestibule where he was, and the engine and tank in front of him, prevented his looking above the tank. We think, upon this evidence, the question of negligence was clearly one for the jury. The respondent was ordered into a place where, in bending over to do the work required of

him, he could not protect himself from inevitable danger if the rope was removed, whether before or after he went there. It was the duty of the master to keep the place of work reasonably safe by holding the tank by means of the derrick and rope, or to warn the servant of the added danger caused by the removal of the rope. By his own act the foreman made the place to which he had ordered the respondent unnecessarily dangerous. This was negligence. Moreover, in any event, the duty to warn was imperative. *McLeod v. Chicago, Milwaukee & P. S. R. Co.*, 65 Wash. 62, 117 Pac. 749; *O'Brien v. Page Lumber Co.*, 89 Wash. 537, 82 Pac. 114; *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814; *Grosjean v. Denny-Renton Clay & Coal Co.*, 62 Wash. 196, 113 Pac. 570; *Shannon v. Consolidated Tiger & Poorman Min. Co.*, 24 Wash. 119, 64 Pac. 169.

The contention that, as a matter of law, the respondent assumed the risk of an obvious danger cannot be sustained. When he was ordered to go into the vestibule and remove the iron lug the respondent had the right to assume that the place would be kept reasonably safe while he was obeying the order. If, as he testified, the rope had not been removed when he was so ordered, there was then no obvious danger to be encountered in obeying the order. There was nothing inherently unbelievable in his testimony. Its credibility was for the jury. Nor was it incumbent upon him to make an inspection, or watch to see that the rope was not removed while he was obeying the order. These principles have been so often announced by this court that it is useless to amplify them by argument. *Dumas v. Walville Lumber Co.*, 64 Wash. 381, 116 Pac. 1091; *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900; *Crow v. Northern Pac. R. Co.*, 45 Wash. 605, 88 Pac. 1022; *Liedke v. Moran Brothers Co.*, 43 Wash. 428, 86 Pac. 646, 117 Am. St. 1058; *Dean v. Oregon R. & Nav. Co.*, 38 Wash. 565, 80 Pac. 842; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467, 71

Pac. 1091; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191.

The appellants contend that the safe-place rule has no application to the facts of this case, and that the court erred in submitting that matter to the jury by an instruction. It is argued that if the place was dangerous it was made so "by the respondent's own act in prying loose the tank." What we have said of the evidence effectually disposes of this argument. It is manifest that if the rope had remained about the tank with the derrick sustaining the weight of the tank, the removal of the piece of iron would have endangered no one. The tank could then have been lowered and the rope afterwards removed, as the evidence shows was the intention from the start.

Finally, the appellants contend that the damages given were excessive. The respondent was injured on March 29. He was confined to his bed for six weeks and was, after that, upon crutches till July 1. At the time of trial, September 8, he was still lame, and testified that he suffered continual pain. Several physicians testified as to the condition of the foot. Their testimony was in sharp conflict. While there was no testimony that his injury was permanent, the physician who treated him testified that the probability of an early complete recovery would be less with a man of his age than with a younger man. The jury returned a verdict for $3,000. The trial court reduced this to $1,500. In such a case we do not feel warranted in further reducing the recovery.

The judgment is affirmed.

Mount, Parker, Morris, and Fullerton, JJ., concur.

[No. 10256. Department One. September 11, 1912.]

EQUITABLE SAVINGS & LOAN ASSOCIATION, *Respondent*, v. WILLIAM BOWES *et al.*, *Appellants*.[1]

BILLS AND NOTES—VALIDITY—EFFECT—CONSTRUCTION—RATE OF INTEREST—PAYMENT. A mortgage note promising to pay $2,025.60 in 120 equal monthly installments of $16.88 each, on account of the principal sum of a loan of $1,200 and $825.60 interest thereon, the same being total interest for 120 months "calculated upon unpaid monthly balances" is, in the absence of fraud, a valid note as against a maker capable of understanding its terms and making a correct computation; and such note calls for interest at the rate of 11.52 per cent per annum, and each monthly payment decreased the principal until, after 48 payments, the decreased principal amounted to $874.84.

MORTGAGES—STIPULATIONS—INCREASED INTEREST AFTER DEFAULT—CONSTRUCTION. A stipulation in a mortgage providing for interest at the rate of 12 per cent upon all remaining unpaid installments, if default be made in the payment of any installment of principal and interest upon the day it becomes due, provides for interest at such increased rate from the date of the default, and not from the date of the note.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered November 2, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Modified.

Chas. E. McAvoy, for appellants.

Peters & Powell, for respondent.

CROW, J.—This action was commenced by Equitable Savings & Loan Association, a corporation, against Andrew R. Cox, William Bowes, Hugh Carlin, and their respective wives, to foreclose a real estate mortgage. The only issue was whether $726.88, tendered by defendants, or $893.19, with attorney's fees and costs, demanded by plaintiff, was the sum remaining unpaid. The trial court entered findings and a

[1]Reported in 126 Pac. 436.

decree for the full amount claimed by the plaintiff. The defendants Bowes and wife and Carlin and wife have appealed.

The note and mortgage were executed on July 27, 1906, by Andrew R. Cox and Sarah Cox, his wife, then the owners of the real estate in the mortgage described. Material portions of the note read as follows:

"For value received, I . . . promise to pay . . . to the order of the Equitable Savings & Loan Association, . . . the sum of twenty hundred and twenty-five and sixty-hundredths dollars ($2,025.60) in one hundred twenty equal monthly installments of sixteen and eighty-eight hundredths dollars ($16.88); . . . the same being as and for a payment on account of the principal sum of a loan of twelve hundred dollars ($1,200) obtained from said association, and the proportion of eight hundred twenty-five and sixty-hundredths dollars ($825.60), interest thereon, which may have accrued on the balance of said principal sum remaining unpaid at the date of the last installment payment, said sum of eight hundred and twenty-five and sixty-hundredths dollars ($825.60) being total interest for said period of one hundred twenty months upon said principal sum calculated upon unpaid monthly balances. If default shall be made in the payment of any of the aforesaid installments of principal and interest upon the day the same becomes due and payable, all of the remaining unpaid installments of principal, and interest accrued to date, provided for in this obligation, shall at once become due and payable at the option of the Board of Directors of said Equitable Savings & Loan Association. . . . After twenty-four months from date and after twenty-four monthly installments have been paid, this note may be paid in full by paying balance of the principal and interest accrued to date of payment; or, additional payments of any multiple of the monthly installment, or multiples of $100 may be made, interest ceasing on any sums so paid."

On November 23, 1906, Cox and wife conveyed the real estate to the appellants Bowes and Carlin, subject to the mortgage lien. Forty-eight installments, to July 20, 1910, inclusive, were paid in accordance with the terms of the note. On August 17, 1910, three days before the next installment matured, appellants tendered $726.88 in full satisfaction of

the remainder of the debt, and demanded a release of the mortgage. The tender was refused. Appllants then made default and respondent foreclosed. There is no dispute as to the facts. The only question is the construction of the contract. We had the same form of note before us in *Equitable Savings & Loan Ass'n v. Barnes*, 69 Wash. 1, 124 Pac. 118. It was contended and proven by the makers of that note that they had been defrauded by the payee into the belief that they were to pay a little less than seven per cent per annum for the use of the money loaned; that they did not understand the true import of the note; and that it would not have been executed by them had they known that the actual interest rate largely exceeded seven per cent. In discussing the note, we suggested that considerable intelligence and business capacity would be necessary to understand its import and effect, or compute the exact rate of interest which it would earn. While that is true, the rate could have been computed, and can be computed in this action. There the makers were deceived by statements of the payee's manager upon whom they relied, with the result that they were induced to execute the note without any computation being made, and were misled into the belief that as drawn it would not earn more than seven per cent per annum. No fraud or misrepresentation has been pleaded or proven in this action. It is not contended that appellants were unable to understand the terms of the note, nor it is shown that they were incapable of making a correct computation. They are therefore bound by the terms of their contract. They introduced no evidence other than a memorandum computation on which they now rely.

The substance of their contention, as shown by such computation, is that $6.88 was to be applied on principal and $10 on interest each and every month during the life of the note, and that, after forty-eight installments had been paid, the total credits on principal would amount to $480, leaving $720 unpaid. To this they added $6.88, one month's install-

ment of interest, which made the $726.88 tendered on August 17, 1910. In other words, they in effect insist that there was to be no variation in the amount of interest to be paid or in the monthly payments upon the principal. The note is not susceptible of this construction, which would lead to the conclusion that the last ten-dollar installment of principal would earn $6.88 interest in one month, and would ignore the express statement of the note that the interest was "calculated upon unpaid monthly balances." A careful computation will disclose that, as respondent contends, the true annual rate, although not specifically stated in the body of the note, was 11.52 per cent.

Respondent's theory is that each monthly installment of $16.88 was to be first applied on the interest earned during the preceding month, then as part payment on the principal, and that each month the principal was to be thus decreased. For instance, the original principal was $1,200, and it appears from a proper computation incorporated in the record that of the first installment of $16.88 payable on August 20, 1906, $11.52 was to be applied in payment of interest earned on $1,200 during the preceding month, at the rate of 11.52 per cent per annum, while $5.36, the remainder of the monthly installment, would decrease the original principal, leaving a reduced or new principal of $1,194.64 upon which interest at 11.52 per cent per annum would be computed during the second month. It will thus be noted that, while the monthly installments of $16.88 were to continue without change for the entire period of one hundred and twenty months, the proportions thereof to be applied on interest and principal would constantly change; that each month the interest payment would decrease, while the principal payment would increase, the latter increasing to the exact sum that the former decreased. A computation of this character, made at the rate of 11.52 per cent per annum, will also show that in the one hundred and twenty months contemplated in the note, payments would total $825.60 on interest, and $1,200 on

principal, the latter being the exact sum loaned. Computation by the same method and at the same rate will disclose the further fact that, after appellants had made forty-eight payments, which it is conceded they did make, the decreased principal would be $874.84. Appellants then tendered $726.88 in full settlement, which respondent refused.

The trial court, after allowing an additional stock installment credit of $1.20, entered judgment for $893.19, upon the theory that, in the event of default, interest should be computed at the rate of twelve per cent per annum from the date of the note instead of 11.52 per cent, the true rate which the note was earning. In this we think error was committed, our construction of the stipulations of the mortgage relative to a default being that 12 per cent was to be computed after default on the principal then remaining unpaid, which would not be increased by the default. It is therefore manifest that judgment was entered for a sum slightly in excess of the principal unpaid on July 20, 1910. Judgment should have been entered for $874.84, less the stock installment credit of $1.20, or for $873.64, with 12 per cent interest thereon from July 20, 1910, in addition to the attorney's fees allowed and costs taxed. Reduced to that amount, the judgment will stand affirmed. Neither party will recover costs on this appeal.

Parker, Gose, and Chadwick, JJ., concur.

[No. 10472. Department One. September 11, 1912.]

J. D. GRANT, *Respondent*, v. ERNST HUSCHKE, *Appellant*.[1]

FRAUD—ISSUES AND PROOF—EVIDENCE—ADMISSIBILITY. In an action on a land trade, in which the answer alleged fraud by the plaintiff in misrepresenting the character of the land as susceptible to irrigation, evidence as to the value of the land is not objectionable because not coupled with the appurtenant water rights; and it was proper to rule and instruct that no damages were claimed by defendant because of failure to have water on the land, where practically all the testimony segregated the value of the land and the value of the water rights, and there was no claim that the plaintiff did not convey the water rights according to representations.

NEW TRIAL—GROUNDS—INSTRUCTIONS—REQUESTS. A new trial should not be granted for failure to give an instruction which was not specifically requested.

APPEAL—REVIEW—GRANT OF NEW TRIAL—DISCRETION. The grant of a new trial for errors of law is not a matter of discretion, and the supreme court will determine its correctness independently of the judgment of the trial court.

APPEAL—QUESTIONS REVIEWABLE—NEW TRIAL. Where a new trial is granted upon one specified legal ground, no other will be considered on appeal.

APPEAL—PARTIES ENTITLED TO ALLEGE ERROR. On appeal from an order granting a new trial for error of law only, the respondent cannot urge the insufficiency of the evidence to sustain the verdict.

Appeal from an order of the superior court for Spokane county, Webster, J., entered October 5, 1911, granting a new trial, after the verdict of a jury rendered in favor of the defendant, in an action on a promissory note. Reversed.

Merritt, Oswald & Merritt, for appellant.

Mark F. Mendenhall and *Geo. D. Emery*, for respondent.

GOSE, J.—The plaintiff brought this suit to recover upon two causes of action. The first cause of action has no bearing upon the controversy here. In the second cause of action it is alleged, that on November 1, 1909, the defendant sold

[1]Reported in 126 Pac. 416.

and assigned to the plaintiff a certain contract in writing for the sale of real estate situated in the city of Seattle, that taxes in an amount stated were then due upon the property, and that as a part of the contract the defendant promised to pay them. As an affirmative defense and counterclaim, the defendant alleged that, about the 1st day of November, 1909, he exchanged his right, title, and interest in certain real estate situate in the city of Seattle for a twenty-acre tract of land in Spokane county, describing it, "together with the water right thereunto appurtenant," then belonging to the plaintiff and his wife, and that he then and there assigned to the plaintiff a written contract which he held for the Seattle property; that the plaintiff and his wife then conveyed the Spokane county property to the defendant; that the transaction was carried on in the city of Seattle where all the parties resided; that, for the purpose of inducing the defendant to exchange the properties, the plaintiff falsely and fraudulently represented to the defendant that the real estate situate in the county of Spokane was "all as level as a floor, would not have to be leveled for the purpose of irrigation, that it was all first-class fruit land, and that all of it was capable of being cultivated and irrigated;" that the representations were not true; that the plaintiff knew them to be false; that the defendant believed them and relied "exclusively" thereon; that he had no knowledge to the contrary and no opportunity of inspection; that he had never seen the land and that, owing to its remoteness from Seattle, he could not inspect it.

It is further alleged that the Spokane property is "hilly;" that upon the hills there are only eight to ten inches of good soil which is underlaid with sand; that a leveling of the land would remove the top soil and uncover the sand; that by reason of the contour of the land, it is impossible to irrigate a great portion thereof; and that the defendant has been damaged, by reason of such false representations, in the sum of $750. The plaintiff replied, denying the allegations of false

representations and admitting the exchange of properties as alleged. There was a verdict for the defendant in the sum of $618.15. Thereafter, on the motion of the plaintiff, a new trial was granted. The defendant has appealed.

The order granting a new trial recites:

"It appearing that at the trial of said cause questions were propounded to defendant's witnesses by defendant's attorneys, asking such witnesses the fair, reasonable market value of the land upon November first, 1909, acquired by the defendant in a trade with the plaintiff, and that plaintiff's attorney objected at the time to each of said questions for the reason that the water rights were not coupled with the land, and included in said questions, and it further appearing that each of such objections were erroneously overruled by the court, and that the court at the trial of said cause erroneously failed to require defendant's attorneys in their questions relative to the value of said land to couple therewith the water rights appurtenant thereto, and it further appearing that at the trial of said cause the court stated that it would instruct the jury that defendant does not claim anything because of the failure to have water on the land, and that the court omitted and failed to give such instruction to the jury, and the court being of the opinion that the aforesaid errors constitute sufficient ground for the granting of a new trial herein, and that there are no other or further grounds or reasons for granting a new trial than those hereinabove specified."

While upon the witness stand, the appellant was asked: "Q. Now, what do you say you have paid for these twenty acres of land? A. $5,000 in all; $100 for the land and $150 for the water right," in an exchange of properties. Practically all the testimony in the case segregates the land and water values, and the contest revolved about the character and value of the land as a separate entity. It will be observed that the answer alleges that the appellant exchanged his Seattle contract for the twenty acres of land in Spokane county, "together with the water right appurtenant thereto," and that the false representations relied upon have reference only to

the lay and quality of the land. There is no claim that the water right conveyed was not according to representation.

The witnesses were asked by counsel for the appellant to state the reasonable market value of the land on the 1st day of November, 1909, the date of the exchange. The objections throughout were that the questions should include the water rights. The court consistently and correctly ruled that the only questions in controversy were the representations made by the respondent, the actual character and quality of the land, and the difference between the value of the land as it actually was at the time of the sale and as it was represented to be. This was the whole controversy. The court finally said, in overruling the respondent's objection to the question: "There is no claim on account of not having water on the land. Mr. Oswald in his answer here does not claim anything because of the failure to have water on the land. I will so tell the jury when I come to instruct them." The court failed to instruct the jury that the water was not in controversy, and this is one of the grounds upon which a new trial was granted. If the respondent desired the instruction he should have specifically requested it, and having failed to do so, no error resulted. *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632; *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324, 58 Pac. 244; *Rush v. Spokane Falls & N. R. Co.*, 23 Wash. 501, 63 Pac. 500.

The respondent argues that the granting of a new trial is a matter of sound discretion, and that, where that discretion has not been abused, the judgment will not be disturbed. The rule stated is correct when the discretion of the court is exercised upon the facts, but it is not correct where it is exercised upon questions of law. In such cases the ruling of the court will be treated the same as a ruling upon any other legal question arising in the progress of the trial, and this court will determine its correctness independently of the judgment of the trial court. *Armstrong v. Musser Lumber & Mfg. Co.*, 43 Wash. 584, 86 Pac. 944; *Tham v. Steeb*

Shipping Co., 39 Wash. 271, 81 Pac. 711; *Allen v. Northern Pac. R. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804; *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011; *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360; *Gardner v. Lovegren*, 27 Wash. 356, 67 Pac. 615; *Thomas & Co. v. Hillis, ante* p. 53, 126 Pac. 62.

These cases also announce the rule that, when a new trial has been granted upon specified legal grounds, our inquiry will be limited to the grounds stated in the order.

We are invited to consider the question of the sufficiency of the evidence to support the verdict. This was considered by the trial court, and its ruling was adverse to the respondent, and the question is not open upon the plaintiff's appeal.

The judgment is reversed, with directions to enter a judgment upon the verdict.

CROW, PARKER, and CHADWICK, JJ., concur.

[No. 10353. Department Two. September 12, 1912.]

AMELIA S. COGSWELL *et al.*, *Respondents*, v. H. H. COGSWELL *et al.*, *Appellants*.[1]

STIPULATIONS—CONSTRUCTION—COMPROMISE AND SETTLEMENT—ARBITRATION—REVOCATION. Where an action to quiet title was compromised, by the plaintiffs agreeing to convey part of the land to the defendants and to sell the defendants any part of the balance at its market value, as determined by the parties or by arbitration, the contract recognized the plaintiffs' title and authorized a decree accordingly, and was not revocable as a mere executory agreement to submit to arbitration, since only an incidental matter was to be submitted; and defendants' remedy on failure of the arbitrators to agree was by application to the courts to fix the market value of the land.

COMPROMISE AND SETTLEMENT—RESCISSION—PART PERFORMANCE—ARBITRATION AND AWARD. Where a contract for the compromise of a suit to quiet title has been partly performed by the execution of a deed to the defendants and entry of the judgment adjudging plain-

[1]Reported in 126 Pac. 431.

tiffs' title to the balance, the defendants cannot rescind for failure of the arbitration as to an incidental matter of fixing the market value of land which they were to purchase from the plaintiffs.

DEEDS—DELIVERY—ACCEPTANCE. A deed made to defendants in compromise of a suit to quiet title, pursuant to agreement, and delivered to and retained by their attorney with their knowledge, is accepted by them.

SAME—RESCISSION—RETENTION OF BENEFITS. A party cannot rescind a compromise of a suit while retaining a deed of land made pursuant to the compromise, without any offer to reconvey the land deeded.

ATTORNEY AND CLIENT—AUTHORITY—COMPROMISE OF SUIT. Where an action to quiet title was compromised by an agreement recognizing the plaintiffs' title, and defendants authorized their attorney to carry out the contract, the attorney had authority to consent to a decree confirming the plaintiffs' title on their performance of the contract.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered November 22, 1911, refusing to vacate a judgment, after a trial before the court. Affirmed.

Prather & Saunders, for appellants.

Pugh & Kizer, for respondents.

ELLIS, J.—This is an appeal from an order dismissing a petition to vacate a judgment.

In June, 1910, the respondents brought an action against the appellants, who are respectively a son and daughter-in-law of the respondents, to quiet title to 320 acres of land situated in Spokane county. The answer alleged that, about sixteen years ago, the respondents had put the appellant, their son, in possession of the land promising to deed it to him as a gift, that he has improved the land at large expense and paid the taxes thereon since and including the year 1901. The answer also set up adverse possession in the appellants, and prayed for a decree declaring the property theirs. The reply denied the allegations of the answer. When the issues had been made up and the cause was in condition to be set for trial, the parties entered into an agree-

ment which was intended to compromise and settle the litigation. The agreement was in writing and provided, in substance, that the plaintiffs, respondents here, should deed to the appellants about 30 acres of the land in dispute, upon which 30 acres was located the farmhouse, barn and orchard. The agreement further provided that the appellants should have the right to purchase all or any part of the remaining land at its market value, and that if the parties were unable to agree upon the market value, each side should name an arbitrator and the two so named should select a third, and the three arbitrators thus chosen should determine the market value of whatever of the land the appellants might elect to purchase. The nature and legal effect of this agreement was fully explained to the appellants by their then attorney. They kept it and considered it for about two weeks, when they signed and acknowledged it and instructed their attorney to carry it into effect. It was also signed and acknowledged by the respondents.

About the time the case was set for trial, and after the agreement for settlement had been entered into, the then attorneys for the parties entered into, and filed in court, a stipulation that a decree should be entered adjudging title of the land to be in the respondents, but that neither party should have any claim against the other for rent or improvements. Upon this stipulation, a decree so adjudging was entered. At about this time or soon after, the respondents executed, and delivered to the appellants' attorney for the appellants, a deed of the 30 acres mentioned in the contract of settlement, together with an easement for access thereto. Thereafter the appellants designated the land they desired to purchase, and each side selected an arbitrator to fix the purchase price in pursuance of the agreement. The first arbitrator selected by the appellants was withdrawn because of certain alleged improper proposals made by him to the other arbitrator with reference to fixing the value of the land. The appellants named a new arbitrator, and the two

arbitrators being unable to agree upon the value of the land, attempted to choose a third. They were unable to agree upon a third arbitrator and so advised the appellants' attorney, who suggested to the respondents' attorney that new arbitrators be appointed. The respondents refused to do this. The appellants then served and filed their petition to vacate the decree, upon the ground that their attorney had no authority to stipulate for the decree, and that the attorney was led into making the stipulation by the mistaken belief that the settlement agreement would be carried out. The trial court, after a full hearing upon the petition to vacate, dismissed the proceedings. The petitioners appealed.

It seems to us that the controversy presented by this appeal is determinable by a consideration of the nature and effect of the written agreement. The appellants assume that it was an agreement of arbitration. Upon this premise they base two contentions; first, that the agreement to arbitrate of itself operated as a discontinuance of the case; and second, that the appellants, in their answer, having set up title in themselves and asked relief, when the agreement to arbitrate failed of consummation, they had the absolute right to disregard the contract and proceed with the original action for the determination of their right to the land.

We find it unnecessary to pass upon the legal soundness of these contentions or to review the authorities cited in their support, for the reason that the agreement, the full purport of which we have set out in the foregoing statement, was not an agreement to arbitrate, but was an agreement in settlement of the real matter in dispute, namely, the title of the property. That matter was not left to arbitration; it was finally settled by the contract, which recognized the respondents' ownership of all of the land in consideration of the conveyance of the 30 acres to the appellants and of the agreement to sell to them at its market value so much of the remainder as they might desire. The provision for arbitration was a mere incident to the agreement to sell. It did

not affect the real substance of the contract. While it is true that a mere executory agreement to submit to arbitration is generally revocable by either party and hence will not be specifically enforced by the courts, the contract here in question does not fall within that rule, for two reasons. In the first place, as we have seen, it was not an agreement to arbitrate the matter in suit. It settled that matter. In the second place, it was no longer executory. The respondents had conveyed to the appellants the 30 acres designated, and the appellants had selected the other land which they desired to purchase. The only thing left to arbitration was the fixing of the price. The arbitrators having failed to agree, and there being no provision in the contract for the appointment of other arbitrators, their failure amounted to an implied revocation of the submission. But that revocation applied only to the incidental provision of the contract as to fixing the value of the land. It did not operate as a rescission of the contract, nor did it give either party the right to rescind.

The rule is well established that where the contract has been partly performed and is no longer wholly executory, or where the provision for arbitration relates only to a mere incident, such as the arriving at the price of property or the determination of its rental value, the death or failure of the arbitrators to act gives neither party to the contract the right to rescind. In such a case the courts will enforce the contract and will, on evidence, fix the value of the land or determine the rental. *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696; *Cooke v. Miller*, 25 R. I. 92, 54 Atl. 927; *Bledsoe v. Rader*, 30 Ind. 354; *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161; *Grosvenor v. Flint*, 20 R. I. 21, 37 Atl. 304; *Viany v. Ferran*, 54 Barb. 529; *Town of Bristol v. Bristol & Warren Water Works*, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740.

The matter in suit having been settled by the solemnly executed contract of the parties, that contract having been

partly performed on both sides, the failure to arbitrate relating only to a nonessential incident not giving ground for a rescission, it follows that the appellants have mistaken their remedy. They should have applied to the court for an enforcement of the contract by fixing the price of the land. They cannot ignore the contract and proceed with the settled suit.

But it is contended that the appellants never accepted the deed of the 30 acres. The evidence is to the contrary. They authorized their attorney to carry out the contract. He accepted the deed. They knew this at the time. He retained it, and their present attorney still has it. They have not reconveyed the land. Even if there was ground for rescission, they have not rescinded. They still retain the fruits of the respondents' part performance. They are in no position to claim a rescission.

Nor can the appellants prevail in their contention that their attorney had no authority to stipulate for the entry of the decree quieting title in the respondents. The contract recognized the respondents' title. The appellants' title to the 30 acres and whatever other of the land they might elect to purchase must come from the respondents. The appellants authorized their attorney to carry out the contract. The decree merely confirmed the title which the contract itself recognized. Its entry was an incident to the carrying out of the contract. We have seen that the contract was not rescinded and cannot be rescinded. To vacate the decree would be a vain and useless thing.

The order appealed from is affirmed.

MOUNT, GOSE, MORRIS, and FULLERTON, JJ., concur.

[No. 10110. Department Two. September 12, 1912.]

MORTON COGSWELL *et al.*, *Respondents*, v. H. H. COGSWELL *et al.*, *Appellants*.[1]

INJUNCTION—WHEN LIES—TO PREVENT TRESPASS—ADEQUATE REMEDY AT LAW—FORCIBLE ENTRY AND DETAINER. Injunction will not lie to restrain a trespass upon lands by persons who were tenants at will, under claim of entry and possession with the knowledge and consent of the plaintiffs; since the plaintiffs have an adequate remedy by action of forcible entry and detainer.

SAME—MULTIPLICITY OF SUITS. Injunction to restrain trespass does not lie on the ground of preventing a multiplicity of suits, where there is but one trespass by one and the same person claiming the right to possession.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered May 15, 1911, granting an injunction *pendente lite* restraining a trespass on real property, after a hearing before the court. Reversed.

Wirt W. Saunders and *L. H. Prather*, for appellants.

Pugh & Kizer, for respondents.

ELLIS, J.—This appeal grows out of the same controversy as that presented in the case of *Cogswell v. Cogswell, ante* p. 178, 126 Pac. 481, which we have just decided. In that case we affirmed an order of the trial court refusing to vacate a decree rendered therein on January 16, 1911, quieting the title in the plaintiffs to the land in controversy, and enjoining the defendants from asserting any title to or interest therein. The decree made no reference to the possession of the land. In April, 1911, the plaintiffs, who are the same persons as the plaintiffs in that action, brought this action to obtain an injunction *pendente lite* restraining the defend-

[1]Reported in 126 Pac. 433.

ants, who are the same persons as the defendants in that action, from trespassing upon the land, other than about 30 acres deeded to the defendants by the plaintiffs, during the pendency of this action. The complaint also prayed that, on the final hearing, a permanent injunction be granted. The hearing was had upon affidavits. Those filed in behalf of the plaintiff set up the decree in the original action quieting title in the plaintiffs. Those filed in behalf of the defendants set up the same matters relied upon as a defense in the original action, among them the fact that the defendants had been placed in possession of the land by the plaintiffs some 17 years ago and had ever since been in possession, and were not injuring the land but were cultivating it in a husbandman-like manner. The defendants' claim of entry and possession with the knowledge and consent of the plaintiffs was not controverted. Upon the hearing, the court made an order restraining the defendants from trespassing upon the real estate described in the complaint, during the pendency of this action, the order to be in effect upon the plaintiffs' filing a bond in the sum of $500. From that order, the defendants have prosecuted this appeal.

It seems to us that the undisputed facts in this case, as well as those developed in the other action between the same parties, which was argued to this court at the same time as this appeal, establish the status of the defendants as tenants at will. The statutory action for unlawful detainer would be adequate and sufficiently speedy to meet everything alleged in the complaint and developed by the affidavits presented at the hearing.

"A fundamental doctrine underlying the entire jurisdiction of equity by injunction against the commission of trespass is, that where adequate relief may be had in the usual course of procedure at law, equity will not interpose by the extraordinary remedy of injunction. For example, where plaintiff is out of possession, although claiming the title in fee, he will not be allowed to enjoin defendants from entering upon the premises or committing acts of trespass thereon,

the remedy at law being ample in such case." 1 High, Injunctions (4th ed.), §699.

See, also, *Spofford v. Bangor & Bucksport R. Co.*, 66 Me. 51.

"An injunction being a preventive remedy, and not used to compel the undoing of what has already been done, it will not be granted in a simple case of trespass by forcible entry and detainer, the remedy at law being regarded as fully adequate to such a case." 1 High, Injunctions (4th ed.), § 712.

Nor can the claim prevail that the injunctive relief is essential to prevent a multiplicity of suits. The same author, after stating the rule as in our first quotation, states the exception and its application as follows:

"The necessity of preventing a multiplicity of suits affords another exception to the rule, and will warrant the interposition of the strong arm of equity, even though there be a remedy at law. But to warrant the interference in such cases there must be different persons assailing the same right, and the principles upon which the relief is granted have no application to a repetition of the same trespass by one and the same person, the case being susceptible of compensation in damages." 1 High, Injunctions, § 700.

The plaintiffs having mistaken their remedy, the order appealed from is reversed and the cause is remanded for dismissal.

MOUNT, GOSE, MORRIS, and FULLERTON, JJ., concur.

[No. 10126. Department One. September 12, 1912.]

F. V. WALDRIP, *Respondent*, v. J. F. HILL, *Appellant*.[1]

DAMAGES—BREACH OF CONTRACT—DUTY TO MITIGATE DAMAGE. In an action for breach of a contract to employ teams continuously at a stated sum per diem for a definite period, lack of diligence on the part of the plaintiff to secure other work for his teams is not shown by his refusal of defendant's offer to employ his teams in hauling sand at a stated price per load, where that involved the additional expense of employing teamsters and a man to assist in loading and the profits were uncertain.

CONTRACTS—BREACH—SUBSTITUTION—WAIVER OF BREACH. In an action for breach of a contract to employ plaintiff's teams at a stated sum per diem, the jury was warranted in finding that defendant's offer to give the plaintiff employment at hauling sand at a stated sum per load was with a view to substituting it for the old contract, acceptance of which would have waived the breach.

DAMAGES—BREACH OF CONTRACT—ELEMENTS. In an action for breach of a contract to continuously employ plaintiff's teams at a specified per diem for a stated period, the expense of feeding the teams is not an element to be deducted, since it was not an expense incurred solely in the prosecution of the work, and it must be incurred regardless of the performance of the contract.

Appeal from a judgment of the superior court for Spokane county, Yakey, J., entered August 5, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Allen & Allen, for appellant.

McCarthy & Edge and *H. H. Cleland*, for respondent.

PARKER, J.—This is an action to recover damages, claimed by the plaintiff to have resulted to him from the defendant's breach of a contract entered into between them. In September, 1910, the defendant was engaged in street contracting work on a somewhat extensive scale in Spokane. At that time the plaintiff was engaged in ranching in Whitman

[1]Reported in 126 Pac. 409.

county, and had several teams of horses. The plaintiff claims that at that time a contract was entered into between them whereby it was agreed that he would take four of his teams to Spokane where the defendant would furnish work for the teams, the plaintiff to furnish the teamsters, for a period of seven month's continuous work for all of the teams, and pay the plaintiff therefor at the rate of $6 per day of eight hours each for each team; that in pursuance of this contract, the teams were taken by the plaintiff to Spokane and put to work for the defendant in hauling material used in his street contract work; that the defendant failed to furnish continuous work for the teams as agreed; and that the time thus lost to the plaintiff during the seven months resulted in his damage in the sum of $1,095. The plaintiff claims damages for the total number of days his teams were not furnished work by the defendant during the seven months, at the rate of $6 per day, less $2.75 per day for teamsters' wages which he was required to pay while the teams were at work, and less the sum of $233 which he was able to earn with his teams elsewhere during the seven months when they were not working for the defendant. Thus measured, he claims his damages amount to $1,095.

The defendant denies that he agreed to furnish work for the plaintiff's teams for any stated period, and also claims that the plaintiff, with due diligence, could have procured work for and earned with his teams during the seven months claimed by him as the duration of the contract, an equal or greater amount than he would have earned had his teams been continuously employed by the plaintiff. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff for the sum of $919.50, from which the defendant has appealed.

The contention of counsel for appellant that respondent did not use due diligence in his efforts to earn money with his teams during the time they were not employed by appellant at the agreed per diem compensation is rested almost

wholly upon evidence introduced tending to show that appellant offered him a contract (which he declined) for hauling sand at a stated price per load. Had respondent accepted this offer, his profits would have been at least to some extent uncertain, though the evidence tends to show that his profits might have been as much or more than they would have been at the $6 per day originally argeed upon. Respondent would have been required under such contract to incur the expense, in addition to his teamsters' wages, of employing another man to assist in the loading of the wagons, as well as some other expense, in order to have carried on the work under such a contract with any prospect of making it profitable. This is enough to show that the offered contract was of quite a different nature than the per diem contract, though the work to be done was substantially of the same nature. It seems to us that the refusal on the part of respondent to accept this new contract offered him by appellant did not show want of due diligence on the part of respondent in earning money with his teams during the time they were not employed under the per diem contract. In *Chisholm v. Preferred Bankers' Life Assur. Co.*, 112 Mich. 50, 70 N. W. 415, 417, the court said:

"It is clear that one who has been prevented from performing a contract of service should not be required to accept a new employment under circumstances which permit the claim that he consents to a modification of the contract, and an abandonment of his right of action; and, ordinarily, acceptance of service in silence would at least give color to a claim that the contract was modified by consent, tacit if not express. See *Brighton v. Railway Co.*, 103 Mich. 426, 51 N. W. 550, and cases cited. It is, of course, possible that an offer of employment might be couched in such terms as to save the rights of a discharged servant, and, when it is, it may be that the evidence should go to the jury, with a view to mitigation of damages; but we discover no evidence in this case tending to show that such employment was offered under circumstances inconsistent with the condition that such em-

ployment should be a modification of the contract, and the plaintiff could not safely accept the offer."

It seems clear to us that this new contract was offered by appellant to respondent with a view to substituting it for the per diem contract, and that the evidence warrants the conclusion that by accepting it respondent would have waived all his rights under his per diem contract. Whether or not the evidence warrants such a conclusion as a matter of law we need not decide, since the evidence of the offer of the new contract and its nature, as compared with the per diem contract, went to the jury for their consideration in determining respondent's duty as to his acceptance of such offered contract under all the circumstances, and the jury found in his favor upon that question.

In *Birdsong v. Ellis*, 62 Miss. 418, where there was involved an unqualified discharge of an employee and a subsequent offer to the employee to resume work under the contract of employment, the court said:

"The offer made by Birdsong must be construed as a proposition to Ellis to resume and continue business under the terms of the original contract. If it had varied the terms of the first engagement, or if anything had occurred to render further intercourse or association between the parties offensive or degrading, or if Ellis had engaged in other employment incompatible with his returning, he might have rejected the offer with safety."

The following lend support to this view: *Jackson v. Independent School Dist. of Steamboat Rock* (Iowa), 77 N. W. 860; *People's Co-Operative Ass'n v. Lloyd*, 77 Ala. 387. In the case last cited, it was held that the employee was not required to resume his work at a less wage in order to mitigate his damage, since "this would have operated a modification of the contract and an abandonment of all claims to higher wages."

Counsel for appellant contends that the trial court erred in not permitting them to prove and submit to the jury the

fact that respondent was at a continual expense of $1.25 per day per team for feed and care of his teams, the argument being that such expense should have been deducted from respondent's damages, since his net earnings would in any event have been that much less had his teams been at work under the per diem contract. The fallacy of this argument is found in the erroneous assumption that appellant's damages are to be measured only by his loss of net profits which he would have made by continuous work under the per diem contract after deducting every possible expense incurred by him while engaged in such work. It seems quite clear to us that the expense to be deducted from the $6 per day which would have been received by respondent by continued work under that contract was only such expense as was incurred by him solely in the prosecution of that work. His teamsters' wages was the only expense so incurred, and this expense he voluntarily deducted. It would be as reasonable to require him to deduct expense incurred for his own board. The very fact that such expense must be incurred regardless of his performance of the per diem contract is sufficient reason for holding that it is foreign to the question of his damage in this case. We think the court's ruling on this question is free from error.

The other questions involved are only questions of fact going to the sufficiency of the evidence to support the judgment. We deem it sufficient to say that a reading of the evidence convinces us that no cause for interference with the judgment is thereby disclosed.

The judgment is affirmed.

MOUNT, CROW, GOSE, and CHADWICK, JJ., concur.

[No. 10418. Department Two. September 12, 1912.]

BLAKE-RUTHERFORD FARMS COMPANY, *Appellant*, v. HOLT MANUFACTURING COMPANY, *Respondent*.[1]

SALES—BREACH OF WARRANTY—REMEDIES OF PURCHASER—DAMAGES—RESCISSION—ELECTION. A cause of action for the rescission of the purchase of a traction engine and return of the purchase price for breach of warranty, is inconsistent with a cause of action to recover damages for loss of profits upon work undertaken by the plaintiff for other people upon representations as to the efficiency of the engine; and an election is properly required.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. In an action for breach of written warranty of a traction engine, the admission of oral evidence as to negotiations merged in the written agreement is not prejudicial, where the oral representations did not go beyond the implied warranty that the machine was adapted to the purpose for which it was sold.

APPEAL—REVIEW—FINDINGS. Findings on conflicting evidence where the witnesses were heard below at first hand are entitled to much weight on appeal.

Appeal from a judgment of the superior court for King county, Main, J., entered February 17, 1912, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for rescission. Affirmed.

Milo A. Root, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

PER CURIAM.—In this case the complaint set up two causes of action. In the first, the plaintiff sought a rescission of the purchase of a traction farm engine, known as a "caterpillar," and a return of the purchase price. In the second, it sought to recover damages for loss of profits upon work which the plaintiff claimed to have undertaken to do with the engine for other people, upon the strength of certain alleged

[1]Reported in 126 Pac. 418.

representations of the defendant as to the amount and character of work which the engine would perform. A demurrer to the complaint was sustained upon the ground that the two causes of action were inconsistent. The plaintiff elected to proceed upon its first cause of action, saving an exception to the court's ruling upon the demurrer. A trial was had to the court without a jury. From a judgment in favor of the defendant, the plaintiff has appealed.

The appellant contends that the court erred in sustaining the demurrer to the complaint, which ruling in effect eliminated its second cause of action. This phase of the case is effectually disposed of by a reference to the case of *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925, wherein this court, a majority concurring, decided this same question adversely to the appellant's contention. The second cause of action was properly eliminated.

As a ground for a rescission, the appellant sought to show that the engine did not meet certain warranties as to construction and efficiency which it is claimed were made by the respondent to induce the sale.

The original contract of sale was in the form of a written order, signed by the appellant, and accepted by the respondent by an agent through whom the sale was negotiated. It provided for payment of $1,500 with the order, and the balance of $2,500 thirty days after shipment. It contained language which the trial court rightly construed in its findings as a warranty that the engine was constructed of good materials and by good workmanship. This was the only express warranty contained in the contract. The home office of the respondent at Stockton, California, declined to approve the contract as to the terms of payment, and insisted upon the payment of the $2,500 upon delivery of the engine to the appellant at Kennewick, Washington. The appellant finally agreed to this modification, and accepted the

engine and paid the $2,500 upon the delivery of the engine at Kennewick. There was no evidence sufficient to show a cancellation of the contract or any modification thereof in any particular, save as to this payment.

The respondent objected to the admission of any evidence as to representations made during the negotiations for the sale prior to the making of this contract, on the ground that these negotiations were merged in the written agreement. The court, however, permitted the widest range of inquiry, and found that the respondent, prior to the sale and delivery of the engine, represented that it would, with proper care and management, furnish power to plow from 25 to 30 acres of land a day, and that the cost of operation for power and lubricating oils would, under proper management, make the use of the engine economical. While this evidence was not strictly admissible in the absence of any claim of fraud, in view of the reduction of the contract to writing without incorporating therein these things as warranties, its admission was not seriously prejudicial, since on a sale of machinery there is always an implied warranty that the machine is adapted to the purpose for which it was sold.

The court, after a very full hearing of evidence on both sides, found that the engine was of good material and workmanship; that it was suited to perform, and did perform, the work for which it was sold; that under proper care it consumed a reasonable amount of fuel and lubricants; that the cost of repairs was not unreasonable; that any difficulties encountered in the operation of the engine were not due to any fault of the respondent nor to any defect in construction, but were due solely to the failure of the appellant to properly operate and care for the engine.

A careful consideration of all of the evidence leads us to the conclusion that these findings were supported by evidence at least as credible and convincing as that adduced to the contrary. The burden of establishing the grounds of rescission asserted was upon the appellant. We cannot say that

it has sustained this burden by a preponderance of the evidence. This is a trial *de novo*, but in a case where, as here, there is a direct conflict in the evidence, the findings of the trial court, who heard the testimony of witnesses at first hand, are entitled to much weight. *Falls City Machinery & Supply Co. v. Goodstein*, 69 Wash. 549, 125 Pac. 786.

A discussion in detail of the three hundred pages of testimony composing the statement of facts would extend this opinion to a tedious length without any profit to any one. The findings of the trial court, which a most painstaking examination of the record impels us to approve, clearly preclude a rescission. The judgment is affirmed.

[No. 10156. Department Two. September 12, 1912.]

CHARLES STEWART, *Respondent*, v. J. C. BOWEN, *Appellant*.[1]

MASTER AND SERVANT — INJURY TO SERVANT — SAFE PLACE — UNGUARDED MACHINERY — EVIDENCE — SUFFICIENCY. In an action for injuries sustained by a night watchman in a mill, who was injured while reaching under an edger to clear out the sawdust, there was sufficient evidence of defendant's negligence, where it appears that the mill was insufficiently lighted, that the saws of the edger were left running when the machine was not in use, contrary to custom, and no warning thereof given to the plaintiff, who could not see that they were running or hear them, and that the saws were without guards underneath the table when they might have been easily and effectively guarded.

SAME — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. In such case, the employee was not guilty of contributory negligence, as a matter of law, in not procuring a lantern before attempting to clear out the sawdust, or in using his hand instead of a scraper or shovel, where he did not know that the edger was in operation, the only light available was in use in another part of the mill, and the sawdust was so closely packed that he could not use the scraper with effect.

NEW TRIAL — CUMULATIVE EVIDENCE — DILIGENCE. A new trial should not be granted for newly discovered evidence that was mere-

[1]Reported in 126 Pac. 414.

ly cumulative or impeaching and no excuse was offered for not producing the witnesses at the first trial.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered January 26, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a night watchman in a sawmill. Affirmed.

Martin & Wilson, for appellant.

Jesseph & Grinstead, for respondent.

ELLIS, J.—The plaintiff, a man about 76 years of age, brought this action to recover damages for the loss of his right forearm, which injury he charges was caused by the defendant's negligence. There was evidence tending to establish, and from which the jury might have found, the following facts: The plaintiff began work as a night watchman in the defendant's sawmill on the evening of April 20, 1909. The injury occurred between 7 and 8 o'clock on the evening of May 4, 1909. He had never worked in a sawmill or around machinery prior to this employment, and had never been in this mill while the machinery was in operation before the evening when the injury happened, this being the first time that any of the machinery had been in operation at night while he was there. In addition to watching the mill at night, it was his duty to remove the sawdust, bark and other rubbish left about the saws and machinery from the day's operation, and to keep up steam in the boiler over night. The mill consisted of a large circular saw (called in the record the "big saw"), a planer, and an edger. These were all on the same floor and were all operated by the same engine. The edger and the planer were about nine feet apart. When the planer alone was in use, the big saw was usually put out of operation by throwing a clutch, and the edger was usually disconnected by unlacing the belt which propelled it. The edger consisted of three saws, each about 16 or 18 inches in

diameter, operating through a table about 3 feet high which stood upon legs. These saws projected above the table about 4 inches. Above the table they were guarded by a hood, but below the table they were wholly unguarded. There was no sawdust carrier or conveyor in connection with the edger. The sawdust and debris which collected under and about this machine had to be shoveled up and placed upon the conveyor of the big saw, which carried it out when that saw was put into operation in the morning. On the evening in question, the planer was the only part of the mill in use. The big saw was thrown out of operation by the clutch as usual, but the belt which propelled the edger was not unlaced, so that the edger saws, though not in use, were then in motion. The only light about the mill was a single lantern then in use in the engine room, which was the only part of the mill of which the sides were closed. There is little dispute as to these things.

The plaintiff testified, in effect, that he knew nothing about the machinery, had never seen it in operation, did not notice the belt, and did not know that the edger was operated by means of the belt, and supposed the edger was not running as it was not in use; that he could not hear it running because of the noise made by the planer, and could not see on account of the darkness. No one had warned him that the edger had not been disconnected, or that it was running, or of any danger in connection therewith. The plaintiff, after cleaning up about the log carriage and carriage track, went to the edger, reached under it with his hand in the darkness to loosen up and remove the sawdust, bark, and other rubbish, when his arm came in contact with one of the edger saws and was severed, necessitating two amputations. He was supplied with a rake or scraper, a broom and a shovel, but he testified that the rubbish was so closely packed beneath the edger that he could not have removed it with the scraper. Much of his testimony was contradicted by the defendant, but since the credibility of the evidence was for the jury, we

cannot disturb the judgment on the ground of insufficiency of evidence if these facts are sufficient to sustain the verdict.

The plaintiff charged as negligence the failure of the defendant to warn him of the danger, the failure to furnish sufficient light, and failure to sufficiently guard the edger saws. A demurrer to the complaint was overruled. The defendant answered, denying negligence, and affirmatively pleading contributory negligence and assumption of risk. At appropriate times, motions for nonsuit and a directed verdict were interposed by the defendant and overruled by the court. The jury returned a verdict for $1,250. The defendant's motion for a new trial was overruled and judgment was entered upon the verdict. The defendant has appealed.

In presenting his case the appellant has confined himself to the contentions: (1) that there was not sufficient evidence to establish the negligence charged; (2) that the evidence shows that the respondent was guilty of contributory negligence; (3) that in any event a new trial should have been granted.

The evidence was uncontradicted that the accident happened between 7 and 8 o'clock in the evening; and while the complete darkness of night had not set in, it was dusk. The head sawyer testified that it was so dark that he, looking from the engine room, could not distinguish the men at the planer, and that he told the appellant there was not sufficient light to work by. There was but one light, a single lantern available. There was some evidence that this lantern was intended for the use of the night watchman, but there was also evidence that it was intended for the use of any of the employees about the mill who might need it. It was in use in the engine room at the time. That room, being enclosed, would have been in darkness so that the engine could hardly have been operated but for this light. That there was insufficient light seems too plain for controversy.

The appellant was also negligent in failing to warn the respondent that the edger had not been disconnected. There

was evidence from which the jury were justified in finding that the respondent did not know that the edger was in motion. There was some evidence that the vibration ought to have warned him, but there was also evidence that the operation of the planer caused a noise and vibration sufficient to account for his not noting the movement of the edger. It is urged that he ought to have seen that the belt was in motion, but his testimony that he did not know how the edger was operated, nor the relation between the belt and the edger was uncontradicted. The appellant having elected to operate the planer, without, as was usual, disconnecting the edger, should have warned the respondent of that fact. This was especially true in view of the fact that the edger saws underneath the table were unguarded. There was evidence that these saws could have been easily and effectively guarded by two semi-circular boards without in any way interfering with the operation of the saws, and that in other mills such guards were used. There was evidence to sustain every charge of negligence. Its weight was for the jury.

The claim that the respondent was guilty of contributory negligence was based upon the fact that he did not procure the lantern before attempting to remove the debris from beneath the edger, and upon the further fact that he used his hand instead of the scraper or shovel. There would be much force in this claim if he had known that the edger was in operation. The appellant testified that he himself had used the edger shortly before the accident, and that the respondent must have seen him, but the respondent and the head sawyer, who was there at the time, both testified that the edger was not in use at any time that evening. The appellant and another witness testified that the respondent afterwards admitted that he knew the edger was in operation but "just forgot" and put his hand under the table. The respondent positively denied ever having made any such admission. It was for the jury to say what evidence it would believe. If the edger had not been running, as the respondent said he

supposed it was not, there would have been no danger in attempting to remove the sawdust in the darkness or with the hands. Moreover, the only light available was in the engine room, where it was obviously required in order to any operation of the planer. There was no evidence that the respondent could have secured the lantern had he called for it. He also testified that the sawdust and bark were so closely packed beneath the edger that he could not use the scraper with effect. Whether he acted as a reasonably prudent man possessed of the same knowledge would have acted under the same circumstances was a question for the jury. We cannot say that, as a matter of law, he was guilty of contributory negligence.

The motion for a new trial was based upon certain affidavits stating what the affiants respectively would testify to in case a new trial was granted. These affidavits show that the proposed new evidence would be merely cumulative or impeaching. Moreover, no sufficient excuse was offered for not producing these witnesses at the trial. There was no abuse of discretion in refusing a new trial.

The evidence was submitted to the jury upon instructions of which no complaint is made. Every principle of law involved being elementary, we have deemed it unnecessary to cite authorities. The judgment is affirmed.

MOUNT, CROW, FULLERTON, and CHADWICK, JJ., concur.

[No. 10226. Department Two. September 12, 1912.]

TURNER INVESTMENT COMPANY, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS—CONTRACTS WITH OWNER—ULTRA VIRES. A city cannot contract with part of the property owners in a contemplated improvement district to form the district and eliminate their property from assessment in consideration of their doing the necessary grading of certain streets, accepting a nominal sum as damages for their property taken or damaged by street extensions and changes of grade in the district; such contract being *ultra vires* and void.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 3, 1911, upon sustaining a demurrer to the complaint, dismissing an action on contract. Affirmed.

William Parmerlee, for appellant.

James E. Bradford and *Howard M. Findley*, for respondent.

ELLIS, J.—Action to recover damages for breach of contract. The court sustained a demurrer to the complaint upon the ground that it failed to state a cause of action. The plaintiff electing to stand upon its complaint, the court entered a judgment dismissing the action with costs. The plaintiff has appealed.

The complaint in substance alleges; that the defendant, by Ordinance No. 13,513, authorized its board of public works to make a contract with the owners of certain lots and parcels of land abutting upon that portion of Third avenue and Third avenue produced, from the north line of Pine street to the south line of Virginia street, and that portion of Stewart and Olive streets lying between the easterly line of Second avenue and the westerly line of Fourth avenue. A

[1]Reported in 126 Pac. 426.

copy of the contract is attached to, and made a part of, the complaint. It recites, by way of preamble, that it is deemed necessary by the city and the contracting property owners that Third avenue, within the above mentioned limits, be widened and extended to a 90-foot street, by adding 12 feet in width on each side from the north line of Pine to the south line of Stewart streets, and taking a strip 90 feet in width as an extension of Third avenue from the north line of Stewart to the south line of Virginia street, and that the same, together with the portions of Stewart and Olive streets above mentioned, be regraded to the elevations established in Ordinance No. 13,513; that the city intends to immediately begin condemnation proceedings to fix the damages caused to abutting property, and that the district is intended to constitute a part of a much larger district, the lines of which are also given; that it is the desire of the contracting property owners, at their own expense, to remove the dirt necessary to be moved in making the regrade as soon as possible, to avoid the delay attendant upon the larger improvement. It is then agreed that the city, upon a seventy-five per cent majority petition, shall establish by ordinance the larger improvement district, and instruct the corporation counsel to immediately institute condemnation proceedings for the taking of the necessary property and to fix the damages caused by the change in grades, and that the condemnation district shall include all of the property owned by the contracting property owners; that in the condemnation proceedings an award of $1 shall be made by the jury in favor of each contracting property owner as compensation for the property taken and for the damages caused by the change of grades; that the property of the contracting owners abutting on Third avenue, Third avenue produced, Stewart and Olive streets, within the above mentioned limits, "shall be eliminated from any assessment to pay for the removal of earth in accomplishing the regrade of said streets and avenues" (with certain immaterial exceptions); that the contracting prop-

erty owners are granted the privilege of removing earth necessary to be removed in grading the portion of the streets in question at their own expense, and without expense to the city or the remaining portion of the proposed improvement district; that the contracting property owners bind themselves, their heirs and assigns to accept an award of $1 as full compensation and damages, and agree to remove all of the earth necessary to be removed in grading the streets in question at their own expense, between May 1, 1906, and May 1, 1907.

The complaint then alleges plaintiff's ownership of one of the lots included in the contract, and that it has a corresponding interest in the contract; that the plaintiff and all of the contracting property owners fully complied with all of the terms and conditions and performed and executed the contract in time and manner as therein provided; that the defendant, upon a seventy-five per cent majority petition therefor by ordinance, established the large improvement district mentioned in the contract, including therein the property of the contracting owners, and instituted condemnation proceedings to fix the compensation for taking of property and damages for change in grades.

As a first breach of the contract it is alleged that the defendant wholly failed to carry out its agreement, in that no valid judgment or award was caused to be made in favor of the plaintiff, and that had the award, as provided in the contract, been made, the property of the plaintiff would have been relieved, under the laws of the state, from any assessment for benefits, made by the eminent domain commission under supplemental proceedings creating an assessment roll. As a second breach it is alleged, in effect, that the defendant wholly failed to carry out its agreement, in that the property of the plaintiff was not eliminated from the assessment to pay for removal of earth in accomplishing the regrades, and the defendant never appropriated anything from its general fund in cancellation of its assessment on appellant's prop-

erty. It is alleged that these breaches occurred January 20, 1911.

It is then alleged that the plaintiff and its predecessors, relying upon the contract, graded the streets abutting on its lot to the established grade, without expense to the defendant and at a cost to plaintiff of $2,500, and permitted the defendant to take a 12-foot strip from the lot to be used by the defendant for a street, which strip was of a value of $4,000 and for which the plaintiff has received no compensation, and that the plaintiff has been compelled to pay an assessment growing out of the condemnation proceedings amounting to $7,500, which the defendant agreed to pay in consideration of the plaintiff's grading the streets abutting on its lot and permitting the defendant to take the 12-foot strip without compensation. It is alleged that the $2,500 was expended in 1908, that the 12-foot strip was taken in 1909, and the $7,500 was paid in January 1911; that a claim for these expenditures and the value of the strip taken was, on January 20, 1911, filed with the proper officers of the defendant and was rejected. The prayer is for $15,000 damages and for costs.

Whether or not the complaint states a cause of action is obviously dependent upon whether or not the contract pleaded was a valid contract. It is clear that the contract contemplated an exemption of the appellant's property from any assessment, either to pay for the improvement or to pay damages awarded in the condemnation proceeding, notwithstanding the fact that the property and streets involved were included in the improvement district. The exemption from assessment in the condemnation proceedings was to be assured by an agreed verdict of $1 as damages in favor of the appellant in the condemnation suit, thus avoiding any assessment for benefits. The consideration for these exemptions was that the plaintiff grade the abutting streets and surrender the 12-foot strip for street purposes. An almost identical contract based upon the same Ordinance, No. 13,513

(as shown by the record in that case), was involved in, and respondent contends was in effect held invalid in, *In re Third, Fourth and Fifth Avenues*, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862. That case arose upon appeal from a judgment confirming an assessment roll for widening, by 12 feet on each side, the streets mentioned. It apparently involved the same district as the larger proposed district mentioned in the contract here in question. It was there held that the portion of the condemnation judgment entered by reason of the agreement ordinance was void, because the agreement ordinance itself was void and the court was therefore without jurisdiction to enter the condemnation judgment. The court said:

"The proceeding was based upon a plan not authorized by the law and in direct violation of the statutory requirement that a jury shall determine all the damages after considering also the benefits, thus making it impossible for the city to agree with certain property holders that their property is not benefited in excess of damages, and that it is therefore exempt from assessment."

This language can mean nothing else than that the contract, based upon the void agreement ordinance, was, at least as to the things therein undertaken to be performed by the city, *ultra vires* and void. The appellant contends that the decision in that case merely means that the city council could not usurp the functions of court and jury, and that the assessment payers would not be bound by its attempt to do so, but that this would not invalidate the contract as between the city and the private contracting parties. It is argued that the contract cannot be *ultra vires* as between the appellant and the city, because the city has the right to acquire land for street purposes either by private contract or by condemnation.

It may be admitted that the city might acquire land for street purposes by private contract, but it does not follow that the contract here involved was valid even as between the

parties. The purpose and subject-matter of the contract was not, in contemplation of either of the parties, merely the purchase of land for street purposes. That was only an incident to the main intent. The recitals of its preamble show that the contract contemplated the formation of a larger improvement district of which the district covered by the contract should form a part, but should be exempted from assessment, and that this part of the larger district might be improved in advance of the remainder. This was the dominant if not the sole inducement to the contract on both sides. The real consideration of the contract moving to the appellant was the formation of the larger district, the securing by the city of the other lands necessary to widen streets therein by condemnation, and the exemption of the appellant's property from assessment for that purpose or for any purpose in connection with the improvement. The invalid purposes were so interwoven with the supposed valid purpose of the city to acquire the 12-foot strip from the appellant by private contract as to render the whole contract void and unenforceable.

"An illegal agreement will not be enforced, and hence is not a contract according to the definition of a contract. The illegality may be found in the matter of the consideration or of the promise as expressed in the agreement, or it may be found in the purpose to which the agreement, although legal in expression, is applied. In either case the agreement is void." 9 Cyc. 465.

This was not merely the exercise of a valid power in an invalid way. The dominant purpose of the contract was invalid and beyond the power of the city to accomplish in any way. It was against public policy and in fraud of the rights of other persons in the improvement district. The contract was, therefore, *ultra vires* and void for any purpose. Herein lies the distinction between this case and the decisions of this court chiefly relied upon by the appellant. In *Criswell v. Directors School Dist. No. 24*, 34 Wash. 420, 75 Pac. 984, the board had the unquestioned power to make

the contract for the building of a school house, with all of its provisions. It was contended that the contract was void because of an alleged failure to advertise for bids as required by statute. It was held that the statute was sufficiently complied with and the contract was therefore valid. But it was there stated that, had the contract been *ultra vires*, there could have been no recovery either upon the contract or upon the *quantum meruit*. It was held, however, that, on account of fraud of the contractor, he could only recover the reasonable value of the building.

In *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, the contract for building a bridge was one which the county commissioners had the power to make, but it was let without calling for competitive bids as required by statute. The contract was therefore held void. It was argued that the contracting parties were liable to a return of the money directed to be paid out by the board and received by the persons building the bridge. The court, following the rule laid down in the *Criswell* case, and in *Chapman v. County of Douglass*, 107 U. S. 348, said:

"While this may be true in some jurisdictions, this court has adopted the more equitable doctrine of allowing the parties, where the contract if entered into in conformity with the statutes would not have been unlawful, to retain from the moneys received by them a sum equivalent to the reasonable value of the property the county acquires and retains in virtue of the execution of the void contract."

In *Chapman v. County of Douglass*, *supra*, also cited by appellant, the contract was for the purchase of land for a county poor farm. The county had the statutory power to make the purchase, but was limited by statute to a payment in cash or to the levy of an annual tax to create a fund for payment. The county made one payment in cash and gave notes for deferred payments secured by mortgage. The court said:

"The purchase itself, as we have seen, was expressly authorized. The agreement for definite times of payment and

for security alone was not authorized. It was not illegal in the sense of being prohibited as an offence; the power in that form was simply withheld. The policy of the law extends no further than merely to defeat what it does not permit, and imposes upon the parties no penalty."

It was therefore held that the county should either pay for the land within a reasonable time or reconvey it.

The same principle, that there may be a recovery on the *quantum meruit* or a return of the consideration of an illegal contract if the illegality relates not to the substance of the contract but only to the specific mode of performance, runs through nearly all of the cases cited by the appellant where a municipal corporation was concerned. But in the case before us, the illegality related to the very substance of the contract. There was an absolute want of power to make such a contract. It seems to us that the case falls squarely within the rule laid down in *State v. Pullman*, 23 Wash. 583, 63 Pac. 265, 83 Am. St. 836, wherein the distinction which we have noted is clearly recognized. There the contract was held void because absolutely unauthorized except by the assent of three-fifths of the voters of the town, which assent was not procured. This court said:

"It is claimed, however, by the appellant, that, having received the benefits of the contract which the city entered into, it ought to be estopped from denying its validity; also that it had ratified the contract by receiving the benefits. It is well established that the power to ratify is coextensive only with the power to contract, and that an act which was illegal for want of authority on the part of the contracting powers cannot be ratified. There has been a conflict of opinion on some branches of this question, but an investigation of the authorities will show, we think, that where courts have estopped municipalities from interposing the plea of *ultra vires* and from escaping the responsibility of their acts, it has been where there has been a defect in the execution of the contracts, as in the issuance of bonds, etc., and not where there has been an absolute want of power on the part of the municipality to contract. The most of the cases cited by the appellant, as we indicated before, were cases of pri-

vate corporations. The appellant cites *Hitchcock v. Galveston*, 96 U. S. 341, in support of its contention. This is a case which falls within the rule announced above, and the city was proceeding within its powers, but in an irregular manner."

The same distinction is also made in *State ex rel. Spring Water Co. v. Monroe*, 40 Wash. 545, 82 Pac. 888, and is recognized in *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999. Judge Dillon, after stating the reasons and necessity of this rule, says:

"It results from this doctrine that contracts not authorized by the charter or by other legislative act, that is, not within the scope of the powers of the corporation under any circumstances, are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power under its charter or constituent statute to enter into the contract. In favor of *bona fide* holders of negotiable securities, the corporation may be estopped to avail itself of irregularities in the exercise of power conferred; but it may always show that under no circumstances had the corporation *power* to make a contract of the character in question." 2 Dillon, Municipal Corporations (5th ed.), § 791.

The appellant here rested its action solely upon the contract and demanded damages for its breach. The complaint showed upon its face that the contract sued upon was *ultra vires* in the absolute sense that it was beyond the power of the city to enter into in any manner. The demurrer was properly sustained. The appellant refused to amend or ask for any other form of relief. The action was properly dismissed.

Whether, in view of the fact that the contract was void and neither party acquired any rights thereunder, the appellant might maintain an action for the possession of the 12-foot strip, we do not decide. That issue is not presented by the complaint.

The judgment is affirmed.

MOUNT, CROW, and FULLERTON, JJ., concur.

[No. 10240. Department Two. September 13, 1912.]

CHARLES H. WAGNER *et al.*, *Appellants*, v. NORTHERN LIFE INSURANCE COMPANY, *Respondent*.[1]

JUDGMENT—VACATION — SECOND JUDGMENT. After entry of final judgment in a cause, the court is without power to enter another, until the first is regularly cancelled or set aside; and the first judgment is not vacated by a second judgment making no mention of the first.

JUDGMENT—STAY—MOTION NON OBSTANTE VEREDICTO. A motion for judgment *non obstante veredicto* does not operate as a stay preventing the entry of a judgment, when it was not treated or considered as a motion for a new trial.

APPEAL — DECISION — REVIEW — JUDGMENT NOT APPEALED FROM. Rem. & Bal. Code, § 1737, providing that the supreme court may affirm, reverse, or modify the judgment appealed from, or direct the proper judgment to be entered, does not authorize the court, upon appeal from a judgment which was void because of a prior final judgment in the cause, to review or modify the first judgment which was not appealed from.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered September 27, 1911, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiffs, in an action to cancel promissory notes. Reversed.

F. A. McMaster, for appellants.

Robertson & Miller and *T. J. Corkery*, for respondent.

ELLIS, J.—The plaintiffs brought this action for the cancellation and surrender of three promissory notes aggregating the sum of $1,373.30, jointly executed by them in payment of premium for three life insurance policies written by the defendant, one upon the life of each of the plaintiffs; and also for the cancellation and surrender of three other promissory notes, jointly executed by them to the defendant, aggre-

[1]Reported in 126 Pac. 434.

gating the sum of $1,820, which were known as reserve notes and were required by the defendant under policies of the kind taken out by the plaintiffs. The complaint demanded judgment for the amount of all of these notes, with interest, in case they could not be surrendered. As ground of action, the complaint alleged that the plaintiffs were induced to take out the insurance by the fraud and misrepresentations of the agents of the defendant through whom the insurance was written. The answer admitted the execution of the notes by the plaintiffs, denied the alleged matters of fraud and misrepresentation, and alleged that the agents had no authority to make any representations other than those contained in the written applications for the policies, and alleged that the premium notes had been cashed by the agents, their commissions deducted, and that the balance was sent to the defendant company.

The cause was tried to a jury. At the close of the plaintiffs' case, and again when all of the evidence was in, the defendant moved for a directed verdict. Both of these motions were overruled. On May 3, 1911, the jury returned a verdict for the plaintiffs in the sum of $1,503.75. On May 4, 1911, a form of judgment was served upon the attorneys for the defendant, and on May 5, 1911, judgment upon the verdict in favor of the plaintiffs was signed by the court, and was filed and entered of record at 9:35 o'clock a. m. of that day. At 4:30 o'clock p. m. of the same day, the defendant filed a motion for a judgment in its favor notwithstanding the verdict, and moved in the alternative that, if that motion should be denied, a new trial be granted, the motion setting up all of the statutory grounds for a new trial.

The court overruled the motion for a new trial, took the other motion under advisement till September 9, and on September 27, 1911, granted the defendant a judgment notwithstanding the verdict, dismissing the action and taxing the costs to the plaintiffs. That judgment did not vacate, set aside nor make any mention of the prior judgment which

had been entered upon the verdict of the jury on May 5, 1911, nor is there anything in the record to show that the prior judgment was ever vacated. There is nothing in the last judgment to show that the court considered the evidence and found it insufficient to sustain the prior judgment and that it should be vacated for that or any other reason. The plaintiffs have appealed from the judgment which was entered on September 27, 1911.

The judgment appealed from must be reversed. The first judgment was a valid judgment. The court had jurisdiction to enter it, and did sign and enter it with all the formality required by law and after notice to the adverse party. It is not claimed that the first judgment was void for any reason. The second judgment did not expressly vacate it nor even mention it. Having been a valid judgment when entered, we must hold that it is still a valid and subsisting judgment, unless we are ready to hold that the solemn judgment of a court, regularly entered with all the formalities of law, may be vacated by implication. We have never so held, nor are we cited to any authority so holding. To so hold would run counter to the cardinal rule that every judgment regularly entered by a court of competent jurisdiction, the parties being regularly before the court, is binding upon the parties until reversed on appeal or vacated in some manner provided by law. The mere entry of a second judgment does not vacate a prior judgment in the same action.

"It has been held that the entry of a second judgment, in the same action, is not a vacation of the first judgment, if there is nothing further to show that such former judgment was regularly cancelled or set aside. 'When a judgment is once entered of record, it must stand as the judgment until it is vacated, modified, or disposed of by some means provided by law; entering additional judgment entries is not one of them.'" 1 Black, Judgments (2d ed.), § 304.

"There can be only one final judgment in any action; and therefore, when such a judgment has once been entered, no second or different judgment can be rendered between the

same parties and in the same suit, until the first shall have been vacated and set aside or reversed on appeal or error." 23 Cyc. 772.

In every instance which has been called to our notice in which the question has been before this court and in whatever form presented, we have held, in the absence of matter of estoppel against the party claiming under it to assert the validity or finality of the first judgment, that the entry of a second judgment in the same action is not a vacation of the first judgment if there is nothing further in the record to show that the first judgment has been regularly cancelled or vacated.

In *Buffalo Pitts Co. v. Dearing*, 37 Wash. 591, 79 Pac. 1104, which was an equitable action, the court took an advisory verdict of a jury, based its findings thereon, and entered judgment for the defendant. The plaintiff filed a motion in the form, and reciting the grounds, of a motion for a new trial. The court, as in this case, without vacating or mentioning its former judgment, made new findings and entered a new judgment in favor of the plaintiff. The defendant appealed from the last judgment. This court said:

"The judgment appealed from must be reversed. After the court had entered one final judgment in the cause, it was without power to enter another one, so long as the first stood on the record as a valid and binding judgment. It is not pretended that the first judgment was void. The court seems to have thought that the entry of the second judgment operated, of itself, as a vacation of the first, although not mentioned in the second judgment. But it could not have that effect. When a judgment, not void on its face, is once entered, it must stand as the judgment in the cause until it is vacated, modified, reversed, or disposed of by some means provided by law; and the entry of a subsequent judgment in the same cause is not a method provided by law for disposing of an original judgment.

"The subsequent judgment was void when entered, and the appellants are entitled to have the same reversed, vacated and held for naught."

This language makes it too plain for argument that we cannot sustain the judgment here appealed from without overruling the decision quoted. Any effort to distinguish the principles involved in the two cases will demonstrate their identity.

In *Chilcott v. Globe Nav. Co.*, 49 Wash. 302, 95 Pac. 264, the clerk, as required by statute (Rem. & Bal. Code, § 431), entered a judgment in favor of the plaintiff upon the verdict of the jury on the same day of its return. Two weeks later defendant's motion for a new trial was overruled. Still a month later, at the instance of the defendant and pursuant to notice given to the plaintiff, a second and formal judgment was signed by the court and filed with the clerk. Notice of appeal was given orally by the defendant in open court at that time. The plaintiff moved to dismiss the appeal on the ground that the notice of appeal was not given at the time the judgment in the action was "rendered or made" as required by statute (Rem. & Bal. Code, § 1719). This court held that the first judgment was the real judgment in the case and became the final and effective judgment when the motion for new trial was denied, and that the notice of appeal, not having been given in open court at that time, was not effective.

In *Wooddy v. Seattle Elec. Co.*, 65 Wash. 539, 118 Pac. 633, the statutory judgment was entered on March 14, 1910, plaintiff's motion for a new trial was denied on March 19, 1910. A formal judgment was signed by the trial judge on December 17, 1910, and was filed on March 14, 1911, on which date a notice of appeal was given. The court held that the first judgment was the final judgment and that the notice of appeal was too late. While these cases do not present a state of facts such as here presented, they are inconsistent with the view that a valid judgment is impliedly vacated by the entry of a second judgment in the same action.

The decisions in *Herzog v. Palatine Ins. Co.*, 36 Wash. 611, 79 Pac. 287; *Jemo v. Tourist Hotel Co.*, 55 Wash. 595,

104 Pac. 820, 30 L. R. A. (N. S.) 926, and *State v. Johnson*, 69 Wash. 612, 126 Pac. 56, do not militate against the views here expressed. In each of these cases the second judgment was entered at the instance of the successful party, and he was, therefore, held estopped to deny that it vacated the first judgment and that it was the judgment of the court for all purposes. These decisions rest in estoppel. The case before us is devoid of any such element.

The respondent contends that the motion for judgment notwithstanding the verdict operated as a stay, and when granted vacated the first judgment just as the granting of a motion for a new trial does. The answer is obvious. The motion for a new trial operates as a stay simply because the statute expressly gives it that effect, and the granting of a motion for a new trial vacates the judgment only because the statute expressly so declares. Rem. & Bal. Code, § 431. We have no statute providing for a motion for judgment *non obstante veredicto* or giving either of these effects to such a motion. At common law it had no such effect, since it could not be interposed after entry of judgment. 23 Cyc. 781.

It is also argued that because some courts have elected to treat a motion for judgment *non obstante veredicto* as a motion for a new trial, and because the granting of a motion for new trial *ipso facto* vacates the judgment, then the granting of a motion for judgment notwithstanding the verdict would also have that effect. This is a palpable *non sequitur*. The motion for judgment has the effect of a motion for new trial only when and because the court elects to treat it as a motion for new trial. When not so treated or considered, it could not have that effect.

But it is urged that, even if it be conceded that the judgment appealed from is void, this court could only send the case back for another judgment to be signed by the trial court. In support of this, Rem. & Bal. Code, § 1737, is cited. That section provides that on appeal the supreme court may

affirm, reverse or modify the judgment or order appealed from and may direct the proper judgment or order to be entered etc. This statute cannot have the effect claimed for it. It was never designed to make this court one of original cognizance. This is a court of review so far as jury cases are concerned. It cannot breathe life into a void judgment. To send this judgment back with an order to vacate the first judgment as being contrary to the evidence and enter a judgment notwithstanding the verdict would be in effect to review and reverse the first judgment from which no appeal has ever been taken. We can do no more than review the judgment which has been brought before us by the appeal.

We do not hold that a judgment may not be vacated upon motion for judgment notwithstanding the verdict. That question is not before us. We do hold, however, that the judgment appealed from did not vacate the first judgment and is therefore void, and that this court, not being a court of first instance, but only a court of review, is at the end of its powers when it finds that fact. It cannot reverse nor vacate the prior judgment which is not here on appeal.

The judgment appealed from is reversed.

MOUNT, CROW, FULLERTON, and CHADWICK, JJ., concur.

[No. 10051. Department Two. September 13, 1912.]

R. K. TAYLOR, *Appellant*, v. ED HOWARD *et al Respondents*.[1]

CONTRACTS—COERCION—CONSIDERATION — VALIDITY. Where plaintiff had paid out $300 to release a collateral note of $750, in consideration of which defendant was to give plaintiff a guaranty note for $300, and the $750 collateral note having come into the defendant's possession, he refused to surrender it or give the guaranty note until plaintiff had promised to pay a third party $200, such promise was coerced and void as without valid consideration.

GUARANTY—CONDITIONS PRECEDENT. A promise by defendant to pay plaintiff any sum up to $300 which, on final settlement between plaintiff and a third person, might be found due to the plaintiff, cannot be enforced until a final settlement in which a sum is found due the plaintiff.

FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER. An oral promise by defendant to pay plaintiff any sum up to $300 which, on final settlement between plaintiff and a third person, might be found due to the plaintiff, is within the statute of frauds.

FRAUDS, STATUTE OF—DEFENSES—PLEADING — NECESSITY. Where the complaint in an action upon an oral contract guaranteeing the debt of another alleged the loan of money in general terms without disclosing the true foundations of the case, the defendant may, under the plea of the general issue, take advantage of the statute of frauds; although ordinarily he could not do so without specially pleading it.

Appeal from a judgment of the superior court for Island county, Still, J., entered September 9, 1911, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for money loaned. Affirmed.

William Sheller, for appellant.

Robert McMurchie, for respondents.

ELLIS, J.—The plaintiff brought this action to recover the sum of $300, and interest thereon at the rate of six per cent per annum from January 18, 1910, upon which date the

[1]Reported in 126 Pac. 423.

complaint alleges the defendant Ed Howard borrowed that sum from the plaintiff for the use of the marital community composed of the two defendants. The answer denied these allegations of the complaint, and contained certain affirmative matter which was, in turn, put in issue by the reply, which also set up additional affirmative matter. It will be unnecessary to notice these affirmative allegations further than to state that they outline the evidentiary matter on either side which might as well have been adduced on the general issue. The cause was tried to the court without a jury. From a judgment in favor of the defendants, the plaintiff has appealed.

The findings of the court, to which the appellant's exceptions were directed and the making of which are assigned as error, cover the vital questions of fact and may be synthesized as follows:

That on January 18, 1910, there was between the plaintiff and one Hugh McLeod an open account, each claiming that the other owed him a sum in excess of $300; that, prior to that time, McLeod, as agent for the plaintiff, had effected a sale of certain lands of the plaintiff, and had taken as first payment thereon a note for $750 payable to his own order, signed by one Thomas and one Wallingford, and had hypothecated the note with the Bank of Coupeville to secure a loan to himself of $300; that thereafter and prior to January 18, 1910, Thomas paid to the plaintiff the purchase price of the land, $1,000 in money and $3,500 in notes secured by mortgage that, pending the redelivery to him of the $750 note, Thomas withheld one note for $1,000 secured by the mortgage and refused to deliver it until the $750 note should be surrendered; that McLeod being unable to pay his loan from the bank and obtain the collateral note, he and the plaintiff went to the defendant Ed Howard, a mutual friend, and McLeod represented to the defendant Howard that the plaintiff owed McLeod a sum in excess of $300; that it was then agreed among the three that the plaintiff should pay

McLeod's debt to the bank and take up the collateral note, and Howard would give the plaintiff his promissory note for the sum of $300 as a guaranty of repayment to the plaintiff of any sum the plaintiff should be found to have lost upon final settlement between plaintiff and McLeod by reason of his paying McLeod's debt to the bank; that the plaintiff then paid McLeod's debt to the bank, redeemed the collateral note, and obtained from Thomas the $1,000 note secured by the mortgage; that in December, 1909, and while the controversy existed between the plaintiff and McLeod as to mutual claims of indebtedness, the plaintiff borrowed from McLeod $200; that, after the plaintiff had paid McLeod's debt to the bank and redeemed the collateral note, it was mutually agreed between plaintiff, defendant Howard, and McLeod that, before the plaintiff should be entitled to receive the guaranty note from Howard or any payment from Howard on account of these transactions, the plaintiff should repay to McLeod the loan of $200; that the plaintiff never repaid to McLeod the $200 and never intended to repay it. The court also found that there was no consideration passing to Howard from either McLeod or the plaintiff or otherwise for the promise made by Howard to the plaintiff.

A reading of the statement of facts convinces us that all of these findings save one are substantially correct as sustained by a fair preponderance of the evidence, which is extremely conflicting. The finding that the $200 given by McLeod to the appellant in December, 1909, was given as a loan is not so sustained. We think the evidence fairly shows that it was given as a payment on account of indebtedness which the plaintiff was then insisting existed in his favor from McLeod. The evidence also shows that the later agreement of the plaintiff to repay to McLeod this $200 before he should be entitled to receive from the respondent Ed Howard the promised note of guaranty for $300 was in a sense coerced. When the appellant paid McLeod's debt of $300 to the bank to release the $750 note which McLeod had hypoth-

ecated as security, he did so through one Swain, who, on receiving the $750 note from the bank, delivered it either to McLeod or to Howard. When the plaintiff demanded this note in order to surrender it to Thomas and Wallingford in return for the $1,000 note which they were withholding, McLeod and Howard declined to deliver the $750 note until the appellant had agreed to repay the $200 to McLeod as a condition precedent to his right to receive from Howard the $300 note of guaranty which had prior to that time been promised to him without any such condition. It seems clear, therefore, that this later promise of the plaintiff to repay the $200 to McLeod was a coerced promise, without valid consideration, and void. The respondent, therefore, could not rely upon the failure to pay this $200 as a defense to this action.

But the other facts found by the court, and which we find were supported by the evidence, are sufficient to preclude a recovery by the appellant. The promise of the respondent was a promise to repay to the appellant any sum up to $300 which, on final settlement between plaintiff and McLeod, might be found due from McLeod to the plaintiff. The note was to be given as securing this guaranty. There was some evidence that the note was written, but there is no evidence that it was ever signed by the respondent Ed Howard, and there is no claim that it was ever delivered to the appellant or to any one for him. On this state of facts, there are two sufficient reasons why the appellant could not recover. In the first place, there was no evidence that there has ever been a final settlement between the appellant and McLeod in which any amount was found due from the latter to the former. In the second place, the respondent's promise was to pay the debt of another, and never having been reduced to writing, it falls within the statute of frauds.

The appellant contends that the defense of the statute of frauds was not available because not pleaded. This is unquestionably the general rule, but the case before us falls

within an exception which we think rests in sound reason and is supported by what we conceive to be the weight of authority. The appellant alleged a loan of money in general terms without disclosing the true foundations of his case as developed by his evidence. It seems only reasonable that under these circumstances a defendant should not be held to a greater particularity of pleading than that required of the plaintiff. The defendant should not be required to anticipate the plaintiff's evidence and meet it by a special plea of the statute. When the evidence develops the applicability of the statute, the defendant should be permitted to take advantage of that fact under the general issue presented by his answer. Browne on the Statute of Frauds, after stating the general rule, announces the exception as follows:

"To this rule, however, an exception must be made where the plaintiff sues on the common counts, and therefore does not disclose the foundation of his case until he puts in his evidence. Under these circumstances, the defendant will be allowed to insist upon this statutory privilege, although his pleading has not in terms done so." Browne, Statute of Frauds (5th ed.), § 508, p. 628.

And again the same text says:

"Where the bill alleges only an oral agreement, and the answer denies it, it has been held that this excludes oral proof of the agreement in issue.

"In the next place, a defendant may insist upon the benefit of the statute by plea of the general issue, or in equity by answer simply denying the fact of the agreement which the plaintiff charges to have been made. This puts the plaintiff to proof of the agreement at the trial or hearing, and he then must produce a writing." Browne, Statute of Frauds (5th ed.), §§ 510, 511, p. 630.

This court has recognized this exception in at least one case. *Nichols v. Oppermann*, 6 Wash. 618, 34 Pac. 162. The article on the statute in 20 Cyc. recognizes the exception in more guarded terms, but cites many authorities from many states sustaining it.

"If plaintiff declares generally on a contract within the scope of the statute of frauds without alleging whether or not it is in writing, defendant may set up the statute by special plea in bar; and if he fails to deny or expressly admits the making of the contract, he cannot have the benefit of the statute unless he sets it up specifically in his pleadings. Where defendant, in answer to general allegations, denies the making of the contract, the question whether he must also plead the statute in order to have the benefit of it arises; and on this point there is a great conflict of authority. In certain jurisdictions it has been held that he must plead it; but, at other times, in the same states, and in other jurisdictions, he has been allowed, under the general issue or a denial of the contract, to obtain the benefit of the statute at the trial." 20 Cyc. 313, 314.

Notwithstanding the admitted lack of harmony in the adjudicated cases, we think the exception rests in sound reason. The answer of the respondent raised the general issue, and while it also set up other evidentiary matter, everything pleaded might have been presented under the denial. The evidence showed that the respondent's promise was to pay McLeod's debt. It also showed that the promise was not in writing. This did not appear in the complaint. Under his denials, the respondent was entitled to avail himself of the statute of frauds as a defense.

The judgment is affirmed.

MOUNT, MORRIS, CHADWICK, and FULLERTON, JJ., concur.

[No. 10141. Department One. September 13, 1912.]

SCANDINAVIAN AMERICAN BANK, *Respondent*, v. WASHINGTON HOTEL & IMPROVEMENT COMPANY *et al.*, *Respondents*, ANNA M. DONAHOE, *Executrix, etc.*, *Appellant*.[1]

MORTGAGES—STIPULATIONS BY MORTGAGE—CONSTRUCTION — BREACH —DAMAGES. Where a purchase money mortgage upon high class business property, which was inaccessable because 80 to 90 feet above street grade, stipulated that the mortgagee should bring the property and part of the street down to the established grade within a specified time, the mortgagor, on breach of the stipulation by delay in performance, can recover the reasonable rental value of the property during the time which she was kept out of its use by reason of the delay; and a provision in the mortgage postponing the maturity of the note until the grading had been done does not show an intention to make that the measure of the mortgagee's liability for the breach of the stipulation, where a substantial part of the purchase price had already been paid.

SAME—INTEREST—ABATEMENT. In such case, the interest on the mortgage note does not abate from the date of its maturity until the grading was completed, where the note by its terms bears interest "until paid," and the mortgage stipulates that it shall not be due and payable until the grading is completed, and the contract contemplates that the mortgagee shall reduce the property to grade and have its value as fixed by the contract.

APPEAL—DECISION—REMAND. Upon reversing a case in which judgment for plaintiff was entered at the conclusion of defendant's evidence on an issue raised by new matter in the answer, a new trial should be allowed in order to allow the plaintiff an opportunity to meet the defendant's testimony.

MORTGAGES—FORECLOSURE—COSTS — ATTORNEY'S FEES — TENDER—EFFECT. Where defendant's tender of the amount due on a promissory note and mortgage was sufficient when made, the plaintiff is not entitled to an allowance for attorney's fees.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 20, 1911, in favor of the plaintiff, in an action on promissory notes and to foreclose a mortgage, after a trial before the court. Modified.

[1]Reported in 126 Pac. 438; 128 Pac. 222.

Peters & Powell, for appellant.

Lyter & Folsom and *Ballinger, Battle, Hulbert & Shorts*, for respondents.

Gose, J.—On the 8th day of May, 1907, the Washington Hotel & Improvement Company, a corporation, sold and conveyed to Michael Donahoe lots 10 and 11, in block 46, of A. A. Denny's addition to the city of Seattle, for a consideration of $140,000. Donahoe paid in cash $75,000. The balance of the purchase price was evidenced by two promissory notes made by Donahoe in favor of the hotel company and secured by a mortgage in its favor upon the property. One of the notes was drawn for $25,000, due six months after date. The other note was drawn for $40,000, payable May 31, 1908. The former note drew interest at the rate of six per cent per annum from maturity, and the latter note drew a like rate of interest from date until paid. The mortgage provided:

"Whereas, the mortgagee has agreed with the mortgagor that it will at its own expense remove all of the dirt and material from the above described lots down to the level of Third avenue according to the grade established by ordinance No. 13,776 within six months from this date, and that it will also at its own expense remove to said new grade all dirt and material from the westerly half of Third avenue from Stewart to Virginia street, and from the northerly half of Stewart street on the south side of said lot eleven, from Second avenue to Third avenue, within six months from this date; and

"Whereas, it, the said mortgagee, has guaranteed to the mortgagor that all dirt and material will be removed from the east half of Third avenue, from Stewart to Virginia street, and from the south side of Stewart street from Second avenue to Third avenue, within eight months from this date so as to make them conform to the new grade, as well as the dirt and material from the block lying between Virginia street on the north and Stewart street on the south, between Third avenue and Fourth avenue down to the new street grade level, within a period of eight months from this date, and that

Third avenue from Pine street on the south to Stewart street on the north shall be graded according to the recently established grade by ordinance No. 13,776 within one year from date, all without cost to the said mortgagor, and that it, the said mortgagee, will save harmless the said mortgagor, as well as the above described lots, from any charge, assessment or tax whatsoever for the regrade of Third, Fourth, or other avenues, streets or alleys, or from widening the same with what is known as the present Denny Hill regrade, or any modification thereof.

"Now the mortgagee hereby expressly undertakes the above contract and it is expressly agreed and understood that the forty thousand (40,000) dollar note herein secured, and no part thereof, shall be due or payable until all the above conditions shall have been fulfilled."

On the 8th day of November, 1908, the Washington Hotel & Improvement Company assigned the note and mortgage to the plaintiff, as collateral security for the payment of the note of the former to the latter of that date, drawn for $43,000, and bearing interest from date until paid at the rate of six per cent per annum. On the 10th day of July, 1909, the plaintiff brought this action for the purpose of foreclosing the mortgage, and to obtain a judgment against Donahoe and wife for the full amount of the $40,000 note, with interest, attorney's fees and costs, and to obtain a judgment against the hotel company on its note. A judgment was entered in favor of the plaintiff upon both notes. Mrs. Donahoe has appealed.

Prior to the commencement of the trial, Michael Donahoe died testate, leaving all his property to his wife, Anna M. Donahoe, who was named as executrix and testamentary trustee. Mrs. Donahoe filed a supplemental and amended answer, claiming a set-off against the bank and the hotel company, and a counterclaim against the latter for damages on account of its failure to do the grading within the time fixed in the mortgage.

The property is a rectangular tract, lying in the southeast

corner of block 46, and has a frontage of one hundred and twenty feet on Third avenue and a depth of one hundred and eight feet upon Stewart street. It extends along the northerly side of Stewart street to an alley midway between Second and Third avenues. The avenues run northerly and southerly, and the streets run easterly and westerly. Virginia street is the first street north of Stewart street. At the time the appellant's testator purchased the property, it was eighty or ninety feet above grade. Third avenue from Stewart street to Virginia street, and Stewart street from Second avenue to Fourth avenue, had about the same elevation. At that time, Second avenue westerly of the property was graded. The Washington Hotel, which had then been erected, lies immediately across the alley from this property. There was no access to the property at the time it was purchased. It was then considered high class business property when it and the adjoining avenues and streets had been brought to grade.

The work of bringing the lots to grade was completed July 1, 1908. The grading of Stewart street from the alley west of the property to Third avenue commenced on the 11th day of February, 1909, and was finished on the 12th day of April following. The grading of Third avenue from Stewart street south to Pine street was completed May 12, 1909. On the 11th day of February, 1909, the elevation of Stewart street at the east line of the alley had been reduced to some ten or twelve feet above grade, and at Third avenue to sixty feet above grade. At that time, as a witness puts it, "You could get on the lots from Second avenue on Stewart street."

The appellant contends, (1) that she is entitled to have deducted from the amount due upon the note the reasonable rental value of the property from November 8, 1907, to February 12, 1909, the date when the property became accessible; and (2) that the interest on the note should abate from the date of its maturity to the same date. These propositions will be considered in the above order.

We think the first contention has merit. The property, together with the adjoining streets and avenues, was eighty to ninety feet above grade when it was purchased, and was inaccessible. It was then known to be high class business property as soon as it and the adjoining streets and avenues should be brought to grade. The mortgagee assumed the burden of bringing the property, and the half of the adjoining street and avenue touching it, to grade by November 8, 1907. It failed to do so, and the property was as effectually withheld from the appellant until February 12, 1909, as though the respondents had retained the actual possession.

The respondents argue that the clause inserted in the mortgage, postponing the maturity of the note until all the grading had been done, shows that it was the intention of the parties to make that the measure of the mortgagee's liability for a breach of the contract. We cannot assent to this view. Carried to its logical conclusion, it would mean that the mortgagee could indefinitely delay the completion of the work with immunity from liability other than the postponement of the maturity of the note. The purchaser had paid $100,000 upon the purchase price, and had obligated himself to pay the balance with interest when the work was completed. Until that was accomplished, he had nothing but the naked legal title, for the property being inaccessible it could not be used. The mortgagee, having breached its contract, is liable in damages to the extent of the appellant's injury, measured by the reasonable rental value of the property put in the condition contemplated by the contract. One witness testified that the reasonable ground rental value of the property in that condition on a long-term lease would have been $1,000 per month. Another witness fixed its value on a like basis at $625 per month. From this testimony the trial court should have determined its rental value from November 8, 1907, to February 12, 1909, and should have deducted it from the note. The statute, Rem. & Bal. Code, § 1736, puts the duty upon us of examining the evi-

dence *de novo*, and finally determining the case. The mean ground rental value, as shown by the testimony, is $812.50 per month, and we will accept that sum as the reasonable rental value of the property.

We cannot think that the second contention is sound. The appellant argues that, when payment is prevented by the act of the creditor, interest is not recoverable during the period of the creditor's default, and has cited authorities which announce that view. The principle is no doubt sound when properly applied, but is not applicable to the facts at bar, for at least two reasons: (1) the note by its terms bears interest "until paid," and the parties have stipulated in the mortgage that it shall not "be due or payable" until the mortgagee has fulfilled all of the conditions of its contract; and (2) the contract contemplates that the appellant shall have the property reduced to grade and made accessible, and that the mortgagee shall have its value as fixed by the contract. In short, that the one party shall have the property in usable form, and that the other shall have its equivalent in money. This view will give to each of the parties precisely what he bargained for. There is no contention that the bank is a holder in due course. It took the note by assignment and with notice of the provisions in the mortgage.

The judgment will be modified and remanded, with directions to the trial court to deduct from the amount of the principal and interest the rental value of the property at $812.50 per month from the 8th day of November, 1907, to the 12th day of February, 1909, and to enter a judgment and decree for the balance in favor of the respondent bank.

PARKER, CROW, and CHADWICK, JJ., concur.

ON PETITIONS FOR MODIFICATION.

[Decided October 26, 1912.]

PER CURIAM.—Both the appellant and the respondents have filed a petition in this court asking for a modification of the opinion heretofore filed herein. The appellant has called

our attention to the fact that her tender was ample after the damages directed in the opinion are deducted, and she has asked that the attorney's fee allowed by the trial court be disallowed. The respondents have directed our attention to the fact that the judgment was entered at the conclusion of the appellant's testimony. They ask that the case be remanded for a retrial so that they may offer testimony on the issue raised by the new matter in the answer of the Washington Hotel & Improvement Company, and so that they may meet the appellant's testimony on the issues as to the time the grading was done and the rental value of the property. There was no specific reference to these facts in the respondents' brief, and we overlooked the fact that they did not present their evidence on these matters.

The case will be remanded, with directions to the trial court to reopen the case for further testimony in harmony with the issues. If, after a rehearing, the appellant's tender is found to have been sufficient in amount when made, after deducting the damages under the rule announced in the former opinion, the court will make no allowance for attorney's fees.

[No. 10385. Department One. September 13, 1912.]

In the Matter of the Estate of JOHN NEEDHAM. JOHN I. MELVILLE, *Petitioner and Appellant*, v. ELIZABETH LAZENBY *et al.*, *Respondents*.[1]

WILLS—LOST WILLS—ESTABLISHMENT — EVIDENCE — SUFFICIENCY. Under Rem. & Bal. Code, § 1314, providing that no lost will shall be admitted to probate unless its provisions shall be clearly and distinctly proved by at least two credible witnesses, both witnesses must testify to its provisions from their own knowledge of its contents, and not from statements made by the testator.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 1, 1911, in favor of

[1]Reported in 126 Pac. 429.

the defendants, in an action to establish a lost will, after a trial on the merits before the court. Affirmed.

H. N. Martin, Fred M. Williams, and *R. M. Webster,* for appellant.

Hurn & Upton and *Charles T. Goodsell,* for respondents.

PARKER, J.—The petitioner, John I. Melville, commenced this proceeding in the superior court to establish a lost will which he alleges was executed in March, 1893, by John Needham, late of Spokane county, who died on March 15, 1910. A trial before the court upon the merits resulted in a judgment denying the prayer of the petitioner, from which he has appealed to this court.

Counsel for appellant has assigned numerous errors based upon the court's sustaining of objections made by counsel for respondents to questions propounded to witnesses in behalf of appellant and to offers of proof made in his behalf. Our view of the correctness of the trial court's final disposition of the cause renders it necessary for us to notice only the force and effect of the evidence so rejected by the court, rather than the somewhat numerous questions presented touching its admissibility. The will alleged to have been made by the deceased was sought to be established under § 1314, Rem. & Bal. Code, providing as follows:

"Whenever any will be lost or destroyed by accident or design, the superior court shall have power to take proof of the execution and validity of the will, and to establish the same, notice to (all) persons interested having first been given; such proof shall be reduced to writing, and signed by the witnesses. But no will shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses."

We will now notice all of the evidence introduced, and which was offered and by the court rejected, tending to prove the provisions of the will. If all of such evidence was legally insufficient to establish the provisions of the will under the last clause of § 1314 above quoted, then of course the rejection by the court of such evidence would be in any event nothing more than error without prejudice, and would not render the final judgment erroneous.

George Skinner was called and testified in behalf of appellant as one of the attesting witnesses to the will. His testimony is not at all certain as to the deceased's executing the paper he says he signed as a witness. However, he was asked, and answered, the following:

"Q. Can you remember the contents of that paper; could you tell the judge what that paper said? A. Well, I understood it was a will."

He was not permitted to state anything further as to the contents of the paper; the court so ruling, evidently, upon the ground that the execution of the paper as a will had not been shown. H. W. Doane was also called and testified in behalf of appellant as one of the attesting witnesses to the will. His testimony is equally unsatisfactory as to the deceased's executing the paper which he says he signed as a witness. Passing that question, however, he was permitted to testify to enough to clearly show that he did not know anything about the contents or provisions of the paper he witnessed, of his own knowledge. J. M. Adams, an attorney, was called as a witness for appellant. It was sought to be shown by his testimony that the deceased, about the year 1901, showed Adams a paper for the purpose of procuring advice relative thereto; that the deceased then stated to Adams that it was his will; that Adams then examined the paper and became familiar with its contents; that it purported upon its face to be a will of the deceased duly executed by him about the year 1898, and that Adams was able to state its contents and provisions from the knowledge of it

thus obtained. It was also sought to be shown by his testimony what the contents and provisions of this purported will were. This offered proof was, upon objection of counsel for respondents, rejected by the court, apparently upon the theory that it was not competent proof either of the execution of the will sought to be established or of its provisions. Counsel for appellant also offered to prove by the testimony of two other witnesses:

"That they together found an instrument [in 1910], and that the instrument was signed by the name of John Needham, claiming in that instrument to give all his property to John I. Melville, making John Melville executor of a last will and testament, and that that will—that instrument was signed by George Skinner and W. H. Doane as witnesses, and it bore the date of March or April, 1893."

There was no offer to produce the paper. The testimony of one of the witnesses was to the effect that they did not preserve it. This offer was also rejected by the court. A careful reading of the entire record convinces us that this statement of the evidence and offered evidence tending to show the provisions of the will is as favorable to appellant's contentions upon that question as the record will warrant.

Assuming, for argument's sake, that the offered evidence had all been received by the court and that it was all true, would it have been a proving of the provisions of the will by "at least two credible witnesses," as provided by § 1314 above quoted? We think not. The only witness produced who could have possibly testified to the provisions of the will from his own knowledge was the witness Skinner. He did state that he understood that the paper witnessed by him was a will, and it is not impossible, had he been permitted to testify further, he would have been able to state its provisions. But assuming that he would have so testified, that would have been only one witness to its provisions, which would not have satisfied the statute. The offered testimony of the witness Adams would not have amounted to the testimony of

one witness such as the statute contemplates, for it was based entirely upon what he was told by the deceased. He knew nothing either of the execution or contents of the will save as told to him by the deceased.

While in the absence of a statute prescribing the manner of proof and number of witnesses necessary to establish a lost will it has been held that the declaration of the testator may be testified to by a witness who has heard such declaration, as evidence tending to prove the provisions of a lost will, it seems plain to us that the testimony of a witness to such a fact is not proving the provisions of the will by such a witness as is required by this statute. A witness who testifies only to what he learns from statements made by the testator is really giving only hearsay testimony. He could not be said to be testifying to the provisions of the will, but only to what another had stated its provisions to be. We think the two witnesses required by the statute must each be able to testify to the provisions of the will from his own knowledge of its contents. Otherwise its provisions would not be proven by two credible witnesses. In *In re Harris' Estate*, 10 Wash. 555, 39 Pac. 148, the only case decided by this court involving this question, it was said:

"Were it not for the express provisions of our own statute we would have but little difficulty in sustaining the conclusion reached by the trial court upon the point now under consideration, upon eminently respectable authority. It has been held, in the absence of a controlling statute, that in cases like the present the declarations of the testator are admissible as proof of the contents of the will. Beach, Wills, § 73; *Sugden v. Lord St. Leonards*, L. R. 1 Prob. Div. 154.

"But the legislature of this state has said that no will shall be allowed to be proved as a lost will unless its provisions shall be clearly and distinctly proved by at least two credible witnesses. This language is mandatory and cannot be disregarded by the courts. There is but one witness in this case who, according to the evidence, ever saw the will sought to be proven, and he says he never saw it after he signed it as a witness, and did not read it at that time. He further states

that he had no knowledge of the contents of the instrument which he signed, except what he subsequently learned from conversations with the decedent and from an examination of the recorded instrument. There is absolutely no proof of the provisions of the will except the declarations of the decedent, if we exclude the alleged record from our consideration, which we are obliged to do, if for no other reason, because it is not proved to be a correct copy. In New York the statute, which is otherwise like ours, provides that a correct copy of a will shall be equivalent to one witness, in proving its provisions. *Knapp v. Knapp*, 10 N. Y. 278. But here we have no such provision, and even a copy proved to be correct would not take the place of a credible witness. The term 'witness,' as used in the statute, evidently means a person who is sworn and testifies in a case, and not a document or paper merely."

The offered testimony of the two witnesses who found a paper purporting to be a will of deceased is of even less aid to appellant than the declarations of the deceased.

We conclude that, taking all of the introduced and offered evidence which tended to prove the provisions of the will, it would in no event be equal to two credible witnesses testifying to the provisions of the will from their own knowledge as is manifestly required by this statute. Our conclusion upon this question renders it unnecessary to notice the specially assigned errors or the sufficiency of the evidence to prove other facts necessary to establish a lost will.

The judgment is affirmed.

CROW, GOSE, MORRIS, and CHADWICK, JJ., concur.

[No. 10158. Department Two. September 14, 1912.]

JOHN A. SODERBERG *et al.*, *Respondents*, v. A. C. McRAE *et al.*, *Appellants*.[1]

TRUSTS—CONSTRUCTIVE TRUSTS—ACQUISITION OF PROPERTY FOR CORPORATION—FRAUD—FIDUCIARY RELATION OF AGENT. Where, by a mistake in the description, one forty of a lime quarry belonging to and developed by a corporation had been conveyed away in an exchange, and the grantee, acknowledging the mistake, sought to correct the same by reconveying the forty to one who was at the time under a contract with the corporation to promote its interests in the development of the quarry, such agent holds the same in trust for the corporation and could not, while occupying a fiduciary relation, secretly obtain the title and assert it adversely to the corporation.

CORPORATIONS—DISSOLUTION — ACTION BY TRUSTEES. Where the secretary of state has dissolved a corporation for nonpayment of its license fees, it is deemed effective until set aside, and an action to recover its property may be maintained by the only trustee who is a stockholder, in view of Rem. & Bal. Code, § 3715d, providing that on such dissolution, its trustees hold its property for the benefit of its stockholders and creditors.

CORPORATIONS—STOCK—TRANSFERS IN BAD FAITH—STOCK PLEDGED —POSSESSION. Where corporate stock was pledged by two promoters as collateral to a note, which was paid by one of them, who thereupon took the stock and held it until transferred to him in satisfaction of a judgment in his favor for contribution, an assignment, *pendente lite*, to a third person by the defendant who did not have possession or control of it, not made in good faith, is ineffectual and void.

TRUSTS—CONSTRUCTIVE TRUSTS—ENFORCEMENT — CONDITIONS PRECEDENT—REIMBURSEMENT OF TRUSTEE. One acting in a fiduciary capacity for a corporation in secretly obtaining title to property belonging to the company which it had exchanged by mistake, is entitled, on being adjudged a trustee in equity, to reimbursement for the consideration which he was compelled to pay to secure the title, especially where the consideration was paid to one entitled to demand it, and the title could not have been secured on more favorable terms.

Appeal from a judgment of the superior court for San Juan county, Joiner, J., entered October 3, 1911, in favor

[1]Reported in 126 Pac. 538.

of the plaintiffs, after a trial on the merits before the court, in an action for equitable relief. Modified.

George McKay, James Kiefer, and *R. E. Morris*, for appellants.

Shank & Smith, for respondents.

Morris, J.—The facts in this case are complicated and difficult of statement and we shall not attempt to recite them all, contenting ourselves with only such a review of them as is necessarily involved in the discussion of the conclusions we have reached. Respondents commenced the action to obtain a conveyance of a certain forty acres on Orcas island, valuable as containing a deposit of lime rock. The title to this forty was, prior to December, 1904, in M. H. Walter, and was on that day, through error in the description, conveyed to the Orcas Lime Company in exchange for another piece known as lot one. The following November, Walter and Soderberg organized the Puget Sound Portland Cement Company, for the purpose of developing lime deposits on Orcas island, including the forty acres in suit, Soderberg having previously purchased from Walter an undivided one-half interest in certain properties owned by Walter, and which were supposed to cover by their legal description the lime quarry, which the parties intended to operate in the name of the corporation subsequently organized. Soderberg and Walter then conveyed their interest in these lands to the corporation in exchange for its stock, and the corporation then proceeded to open up the ledge of lime rock on this forty, supposing it had title to the same, and expended in this work $14,000. In December, 1905, Walter discovered that a mistake had been made in conveying this forty to the Orcas Lime Company and, without informing Soderberg, entered into negotiations with the Orcas Lime Company to have the mistake corrected. The result of these negotiations was a conveyance by the Orcas Lime Company to A. C. McRae, who

was at the time under a contract with the company to promote its interests in the development of the lime quarry, this conveyance being made to McRae at the request of Walter.

At the time of the first transaction between Soderberg, Walter and the Orcas Lime Company, as part consideration of the lands conveyed, two notes of $10,000 each were given by the Orcas Lime Company to Walter, secured by a mortgage on the lands, the mortgage containing conditions as to when and under what circumstances relative to the production of lime from the lands purchased the notes should be payable. These notes had passed into the hands of McRae under a settlement of a suit founded upon the promoter's contract with Soderberg and Walter. Payment of these notes was refused by the Orcas Lime Company, it claiming that the conditions in the mortgage under which the notes were payable had not ripened. Subsequently the notes were used in negotiation between the Orcas Lime Company and Walter and McRae whereby the title to the forty passed to McRae. Shortly after, McRae went east and does not again appear upon the scene for about two years. The Puget Sound Company in the meantime continued its operations upon this forty, Soderberg not having been apprised of any of the facts surrounding the discovery of the error in conveying the forty, nor the negotiations between Walter, McRae and the Orcas Lime Company whereby title to the forty passed to McRae. When Soderberg and Walter organized the Puget Sound Company, they borrowed $10,000 from the Scandinavian-American Bank of Seattle, pledging the stock of the company as collateral. This note was taken up by Soderberg, the stock delivered to him, and he commenced suit against Walter for contribution on the note, resulting in judgment and an assignment from Walter of his half of the stock in satisfaction of the judgment. This Puget Sound Company was subsequently dissolved by the secretary of state for nonpayment of license fees. Its property has since been in the possession of Soderberg, who has paid the taxes

and preserved the property. McRae and Walter had in the meantime organized another company, known as the Pacific Coast Portland Cement Company, and McRae had obtained from Walter a transfer to this company of Walter's stock in the Puget Sound Company.

We have not attempted to state all the facts entering into these transactions. There are others which throw side lights on the relations between the parties, and the attempts of Walter and McRae to possess themselves of the property in issue without the knowledge of Soderberg. Respondents' theory, which was adopted by the court below, is that McRae occupied such a fiduciary relation to the company that he could not use the information or knowledge he obtained adversely to the interest of the company and seek to set up an adverse title in himself, but that he should be held as trustee for the company. In attempting to realize upon the notes he secured in settlement of his controversy with Soderberg and Walter, McRae was justified in seeking to obtain, in satisfaction of his claim against the Orcas Lime Company, as favorable a settlement as he could. The law, however, will not protect him when in his endeavor to do so he secretly acquires property which he seeks to use against the interest of the company to whose interest he had pledged his good faith. It is apparent that the Orcas Lime Company was claiming no rights to this forty under the conveyance from Walter. Subsequent to the time it had procured a survey and learned of the error in description, it had held itself only as the legal holder of the title for the rightful owner. Under this situation, McRae, who had united his interest with that of the company in the effort to so promote its interest as to make its property valuable, could not act adversely to that interest in the obtaining of this title, and seek to assert it adversely to the company whose interest he was bound to protect. The law casts a jealous eye upon one standing in the relation of McRae. It requires, so long as he maintained his fiduciary relation with the company, that he should in

all things seek to further its interest. To secretly obtain title to that which it regarded as its property and then attempt to use that title adversely to the rights of the company is to invite defeat from a court of equity. These principles are so well established as not to require citation to support them.

Some question is raised as to the form of the action, appellant contending that, under the authority of *State ex rel. Preston Mill Co. v. Howell*, 67 Wash. 377, 121 Pac. 861, the Puget Sound Company has not been dissolved and it only could maintain this action. Its attempt to do so, however, would be useless, because of its failure to pay its license tax. We can find no question involved in the *Howell* case properly an issue in this suit. No question is raised by the corporation itself as to the effect of the act of the secretary of state in entering the order of dissolution on February 23, 1910. Nor is the corporation here seeking to reinstate itself by offering to pay arrears of license. So far as the dissolution of the corporation is concerned, it must be so regarded until, in some appropriate proceedings, it is decreed otherwise. Under Rem. & Bal. Code, § 3715d, upon the dissolution of a corporation, its trustees hold its property for the benefit of its stockholders and creditors. Under this statute, we have no doubt the trustees could maintain proceedings to acquire such possession. The only trustee of this corporation who is now a stockholder, or was at the time of its dissolution, is Soderberg. Under these circumstances, we find no objection to the power of the court to enter the decree appealed from.

Neither do we think the Pacific Coast Company has any standing as claimant of Walter's stock in the Puget Sound Company. This stock was never in the possession nor under the control of Walter from the time it was given to the Scandinavian-American Bank as collateral to the $10,000 loan. When Soderberg paid the loan, he took the stock and held it until Walter transferred it to him in satisfaction of the judgment in the action by Soderberg against Walter for

contribution because of the payment of the $10,000 note. The assignment to the Pacific Coast Company was during the pendency of this last suit. We are not impressed with its good faith. Its purpose is apparent and the attempted transfer was void.

It is next contended by appellant that, even though his contention as to the ownership of the forty should be denied, he is still entitled to be reimbursed the price he paid for it. This contention must, we think, be sustained. Otherwise the Puget Sound Company or Soderberg would have both the forty and the tract known as lot one which was exchanged for the forty. It also would result in the Puget Sound Company retaining the benefit of its settlement of the suit brought by McRae, and deprive McRae of what was given to him in the same compromise. It is not claimed there was any fraud in this settlement, and McRae, though he loses the title to the forty, is entitled to retain the benefit of his compromise, whereby he obtained the two $10,000 notes which were the basis of the settlement with the Orcas Lime Company, whereby he obtained $2,000 in cash, notes aggregating $8,000, and the deed to the forty. It is, we think, clear from the testimony of Mr. Dally, president of the Orcas Lime Company, that, while he intended to insist upon the performance of the conditions of the mortgage securing these two notes, in any attempt to enforce their collection, he was satisfied that his company had obtained full value for them, and that one of these notes was charged against the forty in the settlement with McRae. The entry on the books of the company on July 30, the date of this settlement, shows bills payable debit, and real estate account credit, to the amount of $10,000, by the transfer of the forty to McRae in lieu of one of the notes. This entry concludes "per instructions of Mr. Walter," and respondents urge that this evidences a fraudulent purpose on the part of Walter to make the entry read differently from the transaction.

It seems to us, however, the natural meaning of the entry is that the deed was given to McRae on instructions from Walter. The Orcas Lime Company had received this property from Walter, and if it is to be conveyed to another person under instructions from Walter, it was but natural to so indicate in the entry. There is nothing in the record to indicate that the Orcas Lime Company received any other property or thing of value in exchange for this forty. It was certainly entitled to receive some consideration for its conveyance. The mistake, which seems to have been conceded, was in giving the wrong description to the lands purchased, and not that the Orcas Lime Company was not entitled to a conveyance of some description from Walter. It had obtained this title from Walter in exchange for lot one, and it was justified in fixing a consideration for its return. Even though, as we have held, McRae holds the forty in trust for the company he was representing and to whom he owed good faith, it could not require him to act for it unless it is willing to pay the consideration he was compelled to pay in order to acquire the property. This consideration the company received the full benefit of when it compromised the McRae litigation. Equity will not permit it to retain the benefit thus derived and deprive McRae of the consideration he received for that benefit. It does not appear that Soderberg could have obtained title to this forty on terms different from or more favorable than those on which McRae obtained it; and if we hold the conveyance was for his benefit, we must likewise hold the consideration paid was also for his benefit, and charge him with it. All parties are thus equitably dealt with. Soderberg retains lot one and obtains the forty, the Orcas Lime Company receives a consideration for its conveyance of lot one, and McRae receives the $20,000 Soderberg conceded he was entitled to at the time these notes were delivered to him in settlement of his claim against Soderberg and Walter.

We therefore hold that the decree appealed from should be modified to the extent of making the transfer of the forty from McRae to Soderberg conditioned upon the payment of $10,000. The cause is remanded with instructions to so modify. Appellant will recover costs of this court.

MOUNT, ELLIS, CHADWICK, and FULLERTON, JJ., concur.

[No. 10200. Department One. September 14, 1912.]

ADAM P. KISER *et al.*, *Appellants*, v. DOUGLAS COUNTY, *Respondent*.[1]

COUNTIES—ACTIONS—CONDITIONS PRECEDENT—CLAIMS—NECESSITY. Rem. & Bal. Code, § 3918, requiring claims against a county to be presented to the county commissioners for allowance before any action can be brought thereon has no application to an equitable suit to restrain the county from interfering with or diverting the flow of springs claimed by the plaintiff.

WATERS AND WATER COURSES—SPRINGS—PRESCRIPTION—RIGHTS OF PUBLIC—COUNTIES—HIGHWAYS. Springs which were originally open to appropriation may become the subject of a prescriptive right acquired by the public for a watering trough in the highway through adverse use for the statutory period.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered February 21, 1910, upon sustaining a demurrer to the complaint, dismissing an action to restrain interference with certain springs, and to quiet title thereto. Reversed.

W. A. Reneau, for appellants.

John W. Hanna, *Arthur McGuire*, and *Thomas & Hannan*, for respondent.

CHADWICK, J.—Plaintiffs brought this action to restrain Douglas county from interrupting the flow of certain springs located in a highway which traverses their lands, and to quiet

[1]Reported in 126 Pac. 622.

title thereto. Plaintiffs had developed the springs, gathered the waters, and conducted them to a reservoir, from which they drew water for domestic uses and for irrigation. The county answered, admitting that it had interrupted the flow, and set up as an affirmative defense that it had, more than ten years theretofore, developed the springs, and had gathered the waters and conducted a part thereof to a watering trough which it had maintained for the benefit, accommodation, and convenience of the traveling public. Plaintiffs interposed a motion for judgment on the pleadings. This the court treated as a demurrer to the answer, and invoking the rule that a demurrer searches the record and attaches to the first defective pleading, held that the complaint did not state facts sufficient to constitute a cause of action, for the reason that it nowhere appeared that a demand had been presented to the board of county commissioners for allowance or rejection prior to the commencement of the action. Plaintiffs have appealed, and a large part of their argument goes to the office of a motion for judgment on the pleadings, and to the manner in which the motion in this case was treated by the court. This question is not now material, and we shall not discuss it.

It is first contended that, inasmuch as the county did not demur or raise the issue by way of answer, it has waived a demand. The court, in ruling against the sufficiency of the complaint, based its judgment entirely upon *Hoexter v. Judson*, 21 Wash. 646, 59 Pac. 498, and *Rose v. Pierce County*, 25 Wash. 119, 64 Pac. 913. In justice to the trial judge, we feel bound to say that the language of the court in those cases is broad enough to sustain his ruling. But a reexamination of them convinces us that the facts on which the rulings of the court were based would not sustain a holding that a claim or demand of a purely equitable nature and upon which a prayer for a restraining order is based requires presentation under our statute.

There has been great controversy and a resultant division

of authority as to whether claim statutes apply to actions of tort as well as contract. This court has held, in *Barto v. Stewart*, 21 Wash. 605, 59 Pac. 480, that the word "claim" is synonymous with the term "cause of action." In other cases, *Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025, and *Jurey v. Seattle*, 50 Wash. 272, 92 Pac. 107, it is said that like statutes are broad enough to cover a demand of every kind or nature. In all of the cases decided by this court, however, the facts were such that they would or might result in a money judgment. Under the probate statute of non-claim, this court, with almost all others, has held that a mortgage may be foreclosed without presentation of claim, the remedy being in equity and no personal judgment being sought. In this case the question for presentation to the board was not alone that of legal liability for past trespasses, but to restrain its future conduct and to quiet title to property the fee of which is in the plaintiffs. We think an entirely different rule prevails where an action is brought to restrain a threatened injury, or to quiet title to property claimed by the moving party. The statute, Rem. & Bal. Code, § 3918, seems to imply that only such claims, demands, and accounts as are capable of being audited, and upon which warrants may be drawn, come within its comprehension. If the construction put upon the statute by the lower court is to be taken as the proper one, it would follow that, in all cases where a claim for equitable relief existed, the party aggrieved would be obliged to suffer a threatened injury or invasion of property right before he could obtain redress or relief; for it is a matter of common knowledge that, in most of the counties of the state, the commissioners seldom meet oftener than once in each month, and sometimes at less frequent intervals. It was never the intention of the legislature to deny remedies for an actual wrong; the only purpose of the statute being to insure opportunity to settle and compromise claims that might be reduced to money judgments, and to save the cost of an action.

"Such charter or statutory provisions, so far as the requirement of a notice or presentment as a condition precedent is concerned, are in derogation of common right, and should be strictly construed, and cannot be extended by implication beyond their own terms . . . It has been held that the requirement of a prescribed notice or presentation does not apply where the injury is caused by a nuisance; nor to a suit in equity for relief from continued wrongful acts in the nature of a trespass, although there is also involved a demand for damages in the past; . . ." 28 Cyc. 1450.

In *Sammons v. Gloversville*, 175 N. Y. 346, 67 N. E. 622, it was held that a statute similar to our own had no application to a suit on the equity side of the court. In that case the gravamen of the action was a continued trespass. Upon the authority of that decision it was held, in *Gerow v. Liberty*, 106 App. Div. 357, 94 N. Y. Supp. 949, that the statute had no application where the action was brought to restrain a nuisance. In that case the demand was for an order restraining the flow of waste sewage, and incidental damage. See, also, *Bowie County v. Powell* (Tex. Civ. App.), 66 S. W. 237. We, therefore, hold that the complaint was sufficient.

The merits are argued in the briefs, and inasmuch as the case is to go back for retrial, we shall pass upon the law of the case. Originally, that is before the land owned by appellant became the subject of private ownership, the waters of the springs now in controversy were open to appropriation. They were not incident to the political subdivision of land upon which they were situate, and they might have been lawfully appropriated by a settler upon other land, and conveyed by him and appropriated to his own use. This being the legal status of the waters in controversy, we think they might well become the subject of prescriptive right, the real question in the case being whether such right can be acquired by the public. The case is difficult. But, reasoning from the fundamental principles applicable to the rights of the general public, it can be settled. In the case of *Smith*

v. Archibald, 5 Appeal Cases 489, the right of the public to the waters of a well, alleged to be public, was considered by the House of Lords and Privy Council, and while the public right might have been maintained by reference to what is known as the public health act, the right was recognized irrespective of the act. In *Dungarvan Guardians v. Mansfield*, 1 Ir. 420, it is made plain that the public health act only enacted that the sanitary authorities might cause all public wells used for the gratuitous supply of water to the inhabitants of a community to be continued, maintained, and plentifully supplied with water; in other words, that it did not make that common which had hitherto been private; it did not create, but provided for the regulation and maintenance of that which was.

In the last case cited, the well was situate on the defendant's land, at a short distance from the public road. There had been a village about the well, and its waters had been freely used by its inhabitants. Defendant partly inclosed the ground upon which the well was situate, leaving an open passage from the public road down to the well. Finally, he built a wall, which completely inclosed the well, so as to shut out the public from access thereto. Upon demand, he refused to restore the well to its former condition. His principal defense was that "the well and the land upon which the same is situate is exclusive property, and that no public right of access to the well or right of public user of the water had existed." In its opinion the court found it unnecessary to consider whether the soil and freehold of the well passed to the plaintiff, for it said that, in either case, the right, whatever it was, was in the public, and that it had been wrongfully interrupted in that right by the defendant.

Recurring now to the case of *Smith v. Archibald*, *supra*, the prescriptive right of the public to patronize public wells is recognized and clearly discussed by Lord Blackburn. He states that the right contended for by the public authorities could have been, admittedly, acquired by an individual, and

that out of this might come what he calls "an aggregate of these individual rights," making the maintenance of the well thus subject to public control. In *Holmfirth Local Board v. Shore*, 59 J. P. 344, a trough or cistern received the overflow from a spring at some distance from the highway, and had been used by the public gratuitously for watering cattle and for domestic purposes for a period of over fifty years. The defendant, the owner of the abutting land, erected a gate to prevent the access of cattle to the trough, and let a pipe into the bottom of the trough leading into his own house. It was held that the trough or cistern was a public well, used for the gratuitous supply of water to the inhabitants of the community in which it was situate, and as such came under the jurisdiction of the local authorities.

The right of the public in wells and watering places located upon common ground is as ancient as the race. Before tenure in land was recognized, camps were set up near watering places by the roving races out of which the Patriarchs sprung. Many of the sweetest romances of the Bible have their setting about the wells and watering places of that day. They were, as they are now, in many of the older villages of Europe, like the well of Nahor, "at the time of the evening—the time when women go out to draw water—" a place for congregation, visitation and gossip. This common use of water has furnished the principle underlying a form of the police power of this day, and under which the governing bodies of cities and towns establish water systems for the use of the public. Having title, therefore, the right to maintain a common watering place should not be denied in this day, for the necessities of man have not changed.

Appellants submit a number of cases affirming the proposition that the right of the public in a road is no more than an easement for highway purposes, and that no interest in the freehold attaches, except such as is or may be necessary to the enjoyment of the easement. They say:

"The title of the former owner is not extinguished; but is so qualified that it can only be enjoyed subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber, and earth, and for every purpose not incompatible with the public right of way." *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263.

We shall refer to but two of the cases cited in support of appellants' contention; for, unless critically examined, these might be taken as contrary authority. In *Wright v. Austin*, 143 Cal. 236, 76 Pac. 1023, 101 Am. St. 97, 65 L. R. A. 949, the general principle just quoted was reaffirmed, and it was held that the board of supervisors of Sonoma county could not bore a well in a highway for the purpose of collecting a percolating or subterranean flow for the purpose of sprinkling the public road. The court said:

"In our opinion the subterranean water underlying a highway cannot reasonably be said to be one of 'the incidents necessary to enjoying and maintaining the same,' any more than can the waters of a spring be said to be incident to the easement."

This decision was made to rest partly upon the case of *Town of Suffield v. Hathaway*, 44 Conn. 521, 26 Am. Rep. 483. The *Suffield* case is the main reliance of appellants on this appeal. It is said in the brief quoting from the *Wright* and *Suffield* cases:

"As against the owner of land abutting on a public highway, the selectmen of the town have a right to drain a spring on the highway on such owner's side, in such manner as to render the highway safe from its overflow; but they have no right to divert the water from the spring to a public watering-trough on the other side of the highway. . . . The court having found that the works removed by the respondent were useful only for the purpose of collecting the water from the spring and diverting it from there for the supply of a public watering-trough, this ceases to be a question as to when, if ever, a court will interfere with selectmen in the exercise of their discretion in repairing ways. They had

ceased to act for that purpose; had ceased to provide for public safety; had become ministers to the public comfort. In this last capacity, as against this respondent, they had no power to act at all; therefore we think there is no place for a discussion as to their mode of action."

But these cases, though rightly decided upon the facts, nowhere touch the point involved in the instant case. If in either of these cases the abutting owner had acquiesced in a public use of the waters for a time equal to the period of limitation, a prescriptive right might have arisen. Mr. Elliott, in his work on Roads and Streets (3d ed.), § 499, finds the rule to be that the public has only an easement to pass over the highway. The title to all springs and waters thereon remains in the owner of the fee. He also finds that the abutting owner has a right to restrain the use of the highway for purposes inconsistent with the easement. In speaking of the right to divert the flow of water in a highway, he says the rights of the owner in the fee are not to be unnecessarily interfered with:

"It is to be kept in mind that, unless there is an appropriation by due process of law, the local authorities have no right to use the waters even for a public purpose. As highway officers their right is to so dispose of it as to promote public convenience in the use of the highway." Elliott, Roads and Streets (3d ed.), § 558, note.

It would seem that, if there be a right of appropriation by due process of law, there would also be a right of prescription; and indeed, it is recognized in the case of *Terre Haute & I. R. Co. v. Zehner*, 166 Ind. 149, 76 N. E. 169, 3 L. R. A. (N. S.) 277. The suggestion of the Connecticut court that the powers of the highway commissioners do not extend so far as to allow them to take means to minister to the public comfort, is altogether too broad. We have no doubt of the right of the public to make its highways comfortable as well as safe. If it were not so, improved highways in the modern sense of the term would be impossible. The right to park streets, plant shade trees, and maintain drinking fountains

might be restrained at will by any aggrieved taxpayer. In this case it appears that the watering trough was located upon a long reach of road through a semi-arid country, one of the principal thoroughfares in Douglas county. We opine that the act of the county would not be questioned if the board of county commissioners had bought the waters of the spring and carried them in a pipe to a watering trough on the highway, especially so where, as it may be in this case, water at intervals is essential to the comfort of both man and beast. If we admit this right, the legal conclusion quickly follows: that which the county can buy, it can acquire by prescription. And if it can be shown in this case that it has acquired a part of the waters in controversy by long continued use running over the period of limitation, a decree should follow fixing the quantity it is entitled to, the surplus, if any, to the abutting owner.

The sufficiency of the answer is questioned. We believe that it is sufficient to raise the issue we have discussed in this opinion. We therefore reverse the judgment of the lower court, and remand the case with instructions to proceed to trial.

FULLERTON, PARKER, CROW, and GOSE, JJ., concur.

[No. 10260. Department One. September 14, 1912.]

MAHER & COMPANY, *Respondent*, v. S. C. FARNANDIS, *Appellant*, FRED W. CARTER, *Respondent*.[1]

APPEAL—PARTIES ENTITLED—RIGHT TO APPEAL. Where, in an action to foreclose a second subcontractor's lien, plaintiff recovered judgment against the first subcontractor, who was given judgment against the principal contractor for any sum he might be compelled to pay on plaintiff's judgment, the principal contractor is ultimately liable and may appeal from plaintiff's judgment against the subcontractor.

[1]Reported in 126 Pac. 542.

EVIDENCE—BEST AND SECONDARY—CONTRACTS—CHECKS AND SLIPS. In an action to foreclose a lien for excavation work, there was competent evidence of the amount of earth removed, where it appears that plaintiff's foreman, who could not be found at the time of trial, signed daily slips showing the number of loads removed, his signature was identified, the bookkeeper examined and totaled the slips, the total checked with the sum paid by a third party to whom the dirt was sold and delivered, as evidenced by an indorsed check marked paid with a notation on the back as to the number of loads, and the parties had agreed as to the yardage of each load.

MECHANICS' LIENS — ACTION TO FORECLOSE — ISSUES — APPEAL—RIGHT TO ALLEGE ERROR. In an action to foreclose a subcontractor's lien for excavation work, in which plaintiff recovered judgment against another subcontractor, who in turn was given judgment against the principal contractor for any sum he might be compelled to pay on plaintiff's judgment, the principal contractor cannot complain that plaintiff's judgment contained an item that was not lienable, the owner of the property and the subcontractor not having appealed.

SAME—ISSUES—PLEADING — CROSS-COMPLAINT AGAINST CODEFENDANT. In an action to foreclose a second subcontractor's lien for excavation work, in which the first subcontractor and the principal contractor are made defendants, the first subcontractor may cross-plead against the principal contractor and have legal relief on his contract, to avoid a multiplicity of suits, in view of Rem. & Bal. Code, § 406, providing that when the justice of the case requires it, the court may determine the ultimate rights of all the parties.

JURY—RIGHT TO JURY TRIAL—LEGAL ISSUES IN EQUITABLE ACTION. In an action to foreclose a subcontractor's lien, a defendant is not entitled to a jury trial of the legal issues arising between the defendants; since equity, having obtained jurisdiction, retains it to the end.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered September 12, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a subcontractor's lien. Affirmed.

J. C. Allen, for appellant.

C. H. Winders, for respondent Maher & Company.

John P. Hartman, for respondent Carter.

GOSE, J.—The defendant Farnandis had a contract with the defendant Cascade Investment Company, a corporation, whereby he agreed to do the excavating and construct a building for it upon certain of its property in the city of Seattle. He thereafter sublet the excavating work to the defendant Carter, and agreed to pay him eighty cents per cubic yard therefor. Thereafter Carter sublet the work to plaintiff's assignor, who did the excavating at an agreed price of seventy-five cents per cubic yard. In due time the latter filed a notice of a claim of lien against the property, and before the commencement of the action assigned his claim to the plaintiff. This action was instituted for the purpose of foreclosing the lien, and to recover the reasonable and agreed value of the services. The plaintiff prays judgment against both Carter and Farnandis, and prays for a foreclosure of the lien.

The defendant Farnandis denied that he was indebted to the plaintiff, and alleged affirmatively that the work was so negligently performed that earth from the adjoining lot slid into the excavation, damaging a building thereon, and that he expended a stated amount in repairing the damage. The defendant Carter, after denying that he was indebted to the plaintiff, alleged, by way of cross-complaint against the defendant Farnandis, that he had a contract with him for doing the excavating work at the agreed price of eighty cents per cubic yard, and that he sublet it to the plaintiff; that 3,575 yards of earth were excavated, amounting to $2,800, and that there was a balance due him from Farnandis of $1,860. When the case was called for trial, counsel for Farnandis moved *ore tenus* to strike the cross-complaint, (1) because it was improper in such an action, and (2) because he was entitled to try the issue which it raised to a jury. The motion was denied.

The court found that the plaintiff removed 3,575 cubic yards of earth at the agreed price of seventy-five cents per yard, making $2,681.25, and that the agreed price for the

use of teams and wagons was $70, making in the aggregate $2,751.25, of which $1,761.30 had been paid, $1,000 by Farnandis and $761.30 by Carter, and that there was a balance due of $989.95. A judgment was entered in favor of the plaintiff against Carter for that amount, together with $100 attorney's fees and $1.20, the cost of filing the notice of lien; and the lien was established and foreclosed against the property. The court also found that Carter had paid the plaintiff $761.30 which Farnandis was obliged to repay, and that there was also due him from Farnandis five cents per cubic yard upon the entire yardage of 3,575 yards, or $178.75, making in the aggregate $940. A judgment was entered in favor of Carter against Farnandis for that amount, together with any sum Carter should thereafter be required to pay upon the plaintiff's judgment against him. Farnandis only has appealed, and he will hereafter be called the appellant.

We will first consider the appeal in so far as it affects the plaintiff. The plaintiff contends that, inasmuch as it has no judgment against the appellant, he cannot question its judgment against Carter. The appellant meets this contention by saying that he has given a bond to pay all liens, and that he is the one who will ultimately have to pay its judgment if the lien is upheld. We find no such bond in the record, but we will assume that the statement is correct. We think a better reason for permitting the appellant to question the plaintiff's judgment is that the Carter judgment operates against him for any sum Carter may be required to pay on the plaintiff's judgment.

During the progress of the work, about 1,200 cubic yards of earth slid into the excavation, and this was removed by the plaintiff. The court found that it was agreed that this should be paid for at the same rate per yard as the main body of earth, and the judgment includes it. The appellant contends, (1) that there is no competent evidence of the quantity of this earth; (2) that, under the contract and the evidence,

the duty was on the plaintiff to remove it at his own expense; and (3) that the item of $70 for team and wagon hire is not lienable.

Upon the first question suggested, the evidence is that the plaintiff's foreman on the work gave its manager and bookkeeper daily reports, in the form of slips showing the total number of loads removed daily; that the bookkeeper had examined and totaled them, and they showed that 3,575 yards of earth were excavated. The foreman signed the slips, and his signature was identified. At the close of the trial, the foreman could not be found. It was also shown, that the earth was sold and delivered to a third party; that its foreman delivered a check for each load received; that the plaintiff's bookkeeper checked them with the slips, and that they corresponded. The assistant engineer of the party to whom the earth was sold produced its check, and testified that he took it from the records of its office, and that it paid five cents a load. The slips and checks were admitted in evidence. The check purports to have been drawn by the purchaser in favor of the plaintiff for $64.80. A notation on the back of the check shows that it was drawn in payment of 1,296 loads of earth at five cents a load. It bears the plaintiff's indorsement and is stamped paid. The court found that it was agreed between the plaintiff and the appellant that each load contained two and one-half cubic yards of earth. The evidence was competent to prove the quantity of earth removed. *Pacific Telephone & Telegraph Co. v. Huetter*, 68 Wash. 442, 123 Pac. 607; *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158; *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172; *Seattle Lumber Co. v. Sweeney*, 43 Wash. 1, 85 Pac. 677; *Lawn v. Prager*, 67 Wash. 568, 121 Pac. 466.

Upon the second point argued, it suffices to say that the evidence is conflicting as to whether the appellant promised to pay for the removal of the earth contained in the slide. We think, however, that the court was right in finding that

it preponderates in favor of the plaintiff. It is argued that, under a proper interpretation of the contract, the duty was on the plaintiff to protect the walls of the excavation against slides, and it is said that the parol testimony shows that there was a general custom to that effect. This we need consider only in weighing the evidence of the promise of the appellant to pay for the overflow of earth. The plaintiff's evidence shows that, when the slide began, the appellant directed it to proceed with the work, saying that he would pay for it and that he would take care of the walls.

The third contention presents only an abstract question. The plaintiff has a judgment against Carter, based upon sufficient evidence, for the value of the use of the teams and wagons. The owner of the property charged with the lien and Carter have not appealed, and Carter has a judgment against the appellant for whatever amount he pays the plaintiff upon its judgment against him.

The appellant makes two principal contentions against the Carter judgment: (1) that the court erred in not striking the counterclaim, and (2) that, if the issue raised by the counterclaim was triable in this action, it was an issue of law, and he was entitled to a jury trial. We think the better view is that, where the original bill presents questions of equitable cognizance, the defendant may have legal relief against the plaintiff, and that the several defendants may cross-plead with each other and have all rights between them germane to the subject of the bill determined. Pomeroy, Code Remedies (3d ed.), § 808; 16 Cyc. 115, 116, subds. c and d; *Haberzettle v. Dearing* (Tex. Civ. App.), 80 S. W. 539; *Biegler v. Merchants' Trust Co.*, 164 Ill. 197, 45 N. E. 512; *Clark v. Lee*, 21 Iowa 274; *Quest v. Johnson*, 58 Mo. App. 54; *Pratt v. Boody*, 55 N. J. Eq. 175, 35 Atl. 1113; *Slack v. Hughes*, 71 Ill. App. 91; *Newton v. Rebenack*, 90 Mo. App. 650. This rule avoids a multiplicity of suits, is in aid of orderly procedure, and is in harmony with the statute. The code, Rem. & Bal., § 406, provides that, when "the justice of the

case requires it," the court may determine "the ultimate rights of the parties on each side as between themselves."

The case of *Haberzettle v. Dearing* is much like the case at bar. That case was prosecuted to foreclose a mechanics' lien. The Home Ice Company having made a contract for the work, later sold the property to one Walter. Both the ice company and the heirs and administrator of the Walter estate were made defendants. The ice company answered, admitting the debt, but alleged that Walter had assumed it. The ice company by cross-bill pleaded that it had paid a stated amount to plaintiff, aside from the amount sued for, for doing the work, and that the Walter estate was liable, and asked judgment against the estate therefor. The contention of the ice company was that, when Walter purchased the plant, he assumed its contract with the plaintiff as an entirety, and became liable for the entire cost of the work. It was held that, as incidental to the suit, the court had power to determine the indebtedness between the parties arising out of the contract. A controversy having arisen between the ice company and Walter as to who was liable to the plaintiff for the debt, it gave Walter a bond with two sureties, conditioned that the bond should be enforceable if it was determined that it was liable for the debt. At the instance of the heirs and administrator of the estate, the sureties on the bond were made parties defendant. It was held that they were proper parties to the action, reversing the trial court in that respect.

Nor was the appellant entitled to a jury trial. The rule is that when a court of equity obtains jurisdiction, it will retain it for a final determination of all the issues, legal as well as equitable, germane to the subject-matter of the bill. *Installment Building & Loan Co. v. Wentworth*, 1 Wash. 467, 25 Pac. 298.

The judgment is affirmed.

Crow, Chadwick, and Parker, JJ., concur.

[No. 10371. Department One. September 17, 1912.]

JULIA DREWANEAK *et al.*, *Appellants*, v. WALVILLE LUMBER COMPANY, *Respondent*.[1]

MASTER AND SERVANT—FELLOW SERVANTS—TRANSMITTING SIGNALS. Where the head loader in loading logs on cars with a donkey engine usually gave the signals for the engineer to start the engine, but in case he could not see the engineer, he transmitted the signals through the second loader, the two are fellow servants, and recovery cannot be had for the death of the head loader through negligence of the other in signaling the engineer to start while the deceased was in a place of danger.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered March 20, 1912, upon granting a nonsuit, in an action for wrongful death. Affirmed.

Bates, Peer & Peterson and *Gus L. Thacker*, for appellants.

Dysart & Ellsbury, *C. D. Cunningham*, and *Forney & Ponder*, for respondent.

CHADWICK, J.—This is an action to recover damages for "death by wrongful act or neglect." Rem. & Bal. Code, § 183. The defendant company conducts a logging camp in Lewis county, and at the time of the accident complained of, the deceased and four other employees were engaged in loading logs on cars for transportation to the company's mill. The deceased was employed as head loader, and one Dyrkazc was second loader. The logs were loaded by means of a donkey engine, which was started, controlled, and stopped by signal from the two loaders. The signals were usually given by deceased, but in case the deceased was in a position where he could not see the engineer or spool-tender, he would transmit the signal to his fellow workman Dyrkazc, who in

[1]Reported in 126 Pac. 536.

turn transmitted it to the engineer. This case is prosecuted upon the theory that the deceased was killed by reason of a signal to start, given by Dyrkazc while the deceased was in a place of danger. One of the defenses interposed is that the deceased met his death through and because of the negligence of a fellow servant. From a judgment of nonsuit, the present appeal is prosecuted.

The case is controlled by *Frengen v. Stone & Webster Eng. Corp.*, 66 Wash. 204, 119 Pac. 193. In that case the plaintiff and a fellow workman were on the roof of a building under construction. They were taking in timbers, hoisted to the roof by means of a derrick operated by an electric motor. The operation of the derrick was controlled by signals, transmitted to the foreman below by the plaintiff or his fellow workman, usually by the latter. After reviewing many decisions of this court on the fellow servant doctrine, the court said:

"Under the uncontradicted testimony in this case, respondent did not depend upon the forman to signal him when the motor was to be started. The foreman, on the other hand, depended upon respondent and his fellow workman, Boyle, to tell him when he should direct the movement of the motor and derrick. The signal was not one coming to them upon which they should act. It was one proceeding from them upon which the foreman would act. If the foreman in this case directed the starting of the motor when respondent was in a position of danger, it was only after receiving a communication from Boyle—working alongside of respondent, engaged in the same endeavor to pull in the timber—that everything was all right and to go ahead. Boyle and respondent were engaged in the same work at the same time. Neither one had any supervision over the other. They acted in common, each had ample opportunity to observe the other. Respondent knew that the foreman would not start the motor after it had stopped, to permit them to obviate the difficulty of its landing, until Boyle had informed him that it was proper to do so. They answer every test of fellow servants. It is true that Boyle generally gave the signal, and that the foreman depended upon him to do so because of his greater experience.

There was no necessity of respondent and Boyle jointly giving the signal. The respondent knew that the foreman would act on Boyle's signal, and we cannot see why, knowing this, and knowing he was in a position of danger, he did not inform Boyle, when the foreman called, that he was not ready to have the cable moved. It seems to us it was his duty to do so, having for two weeks been engaged in the same work, and knowing during all that time that the foreman would act under Boyle's direction, and having had every opportunity to observe his method of communicating the signal to the foreman. We might add, what more could the master do than he has done here? He refused to act upon his own assumption that respondent and Boyle were ready, but required them to determine for themselves when they were ready. Their protection in this regard is placed in their own hands."

The present action is even stronger in favor of the respondent than the case cited, for in that case the signals were usually, if not always, transmitted by the fellow workman of the plaintiff, while here the contrary is true. That fact was the principal reason for the dissent of Chief Justice Dunbar, for in reference to the opinion of the majority, he said "I have no fault to find with the law as announced by the majority, but in my judgment, it has not been applied to the facts in this case. The opinion says, in the course of the statement, that the signal was generally, if not always, given by Boyle. This statement to be literally correct, should be a little more definite on this crucial question." The fact that the two servants in this case may have been a few feet further apart, or out of sight of each other, does not affect the legal principle involved. Notwithstanding that fact, their relationship to each other and their duties remain the same.

The judgment is affirmed.

GOSE, CROW, and PARKER, JJ., concur.

[No. 10224. Department Two. September 17, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. ELMER DRUMMOND, *Appellant*.[1]

HOMICIDE—PREMEDITATION AND MALICE—JUSTIFICATION—EVIDENCE—QUESTION FOR JURY. In a prosecution for homicide, the questions of malice and premeditation and justification are for the jury, where it appears that defendant and deceased had quarreled the day before over an obstruction in the road, that defendant admitted that he shot the deceased, whose body shortly after the shooting was found in a large pool of blood near his hat in the road, and that some ninety-six steps away was an empty cartridge, and the tracks of three persons lead away therefrom, but no footprints were found near the body, and the defendant and the two other witnesses testified that deceased first attacked them in a threatening manner as though about to draw a pistol, when defendant shot twice, and that after the second shot the deceased turned and walked away out of sight and they did not know that he was mortally wounded.

HOMICIDE — JUSTIFICATION — REDUCTION OF DEGREES — BURDEN OF PROOF. The killing being admitted, the burden of proving justification or reducing the crime to manslaughter is upon the defendant.

HOMICIDE—PREMEDITATION AND MALICE—EVIDENCE—INSTRUCTIONS. It not being necessary that there be direct and positive evidence of premeditation or malice, instructions thereon are properly given if those elements could be inferred from the circumstances proven.

HOMICIDE—EVIDENCE—ADMISSIBILITY. In a homicide case, the shirt worn by the deceased at the time he was shot, in the same condition as when removed from the body, is admissible in evidence.

SAME—EXPERT EVIDENCE. In a homicide case, where defendant claimed that deceased attacked him and walked away after being shot, the evidence of a physician describing the wound in detail and stating his opinion as to how far deceased could have walked after receiving it, is admissible.

WITNESSES—IMPEACHMENT — REBUTTAL — CREDIBILITY. After accused had denied that he and his codefendants had rehearsed their testimony in detail, evidence in rebuttal to show that the statement was untrue, is admissible, within the discretion of the court, as affecting their credibility.

[1]Reported in 126 Pac. 541.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered September 26, 1911, upon a trial and conviction of murder in the second degree. Affirmed.

J. A. Rochford and *Albert I. Kulzer* (*Robertson & Miller* and *T. J. Corkery*, of counsel), for appellant.

Howard W. Stull and *Herman T. Wentz*, for respondent.

MOUNT, J.—Elmer Drummond, on June 10, 1911, shot and killed William E. Flynt, in Stevens county. He and two other defendants were charged by information with the crime of murder in the first degree. Defendant Elmer Drummond was tried separately, and was convicted of murder in the second degree. He appeals from the judgment pronounced upon the verdict of the jury.

Several errors are alleged, which are argued in the briefs under four different points which we shall notice in their order. It is first claimed that the evidence is insufficient to sustain the verdict. We have carefully read the evidence, which shows without dispute that the appellant, on the morning of June 10, 1911, between the hours of ten and eleven o'clock, shot and killed the deceased; that appellant, on the day before the killing, had some difficulty with the deceased over an obstruction which appellant and his brother had placed in a road. The deceased compelled the appellant to assist in removing this obstruction. On the day of the killing, the deceased was, with a horse, dragging some poles from a slashing near the line which divided the farms of the deceased and of the appellant's father. At about ten o'clock, the deceased dragged a load of poles down to his house and returned for another load. After he had been gone a short time, his wife saw the horse come back without the deceased. Mrs. Flynt then went up the road and found her husband lying in the road dead, about two hundred yards from the house, with a bullet hole in his breast. No tracks were visible

beyond the body. Some ninety-six steps beyond the body, an empty cartridge was found near the road, and foot prints of three different persons lead away from near that point. The appellant, soon after eleven o'clock a. m. of that day, told a neighbor, living about a mile from the scene of the shooting, that he —appellant— had had some trouble with Mr. Flynt and had gotten the better of him, and advised the neighbor to go up there, that he might be needed. The appellant then went to the town of Chewelah, and found an officer to whom he stated that he had shot Mr. Flynt, and gave himself into the custody of the officer.

No eyewitness to the shooting was called by the state. The fact of the quarrel on the day before, the fact that no foot prints were found near the body, the admission of the appellant that he had done the shooting, the absence of blood-stains on the road except one small spot near the body of the deceased, the fact that a large pool of blood was found where the deceased lay, the fact that the wound was a mortal wound, on account of which the deceased could not have gone ninety-six steps after he received the wound, the fact that the light straw hat which deceased wore was found near his head where the body lay, and the fact that the foot prints of three different persons led away from the point where the empty cartridge was found, were relied upon by the state to show that the deceased had been waylaid and cruelly murdered. These circumstances no doubt tended to prove malice and premeditation. They were therefore sufficient to go to the jury.

All three defendants testified, in substance, that Mr. Flynt first attacked them; that while Mr. Flynt was dashing toward the appellant in an angry and threatening manner, with his hand in a position as though he were attempting to get a pistol, the appellant shot twice at the deceased; that after the second shot, deceased turned and walked away and around a point in the road out of sight, and that they did not know he was mortally wounded. This, of course, presented

an issue for the jury, whether the killing was done in malice and with premeditation or whether it was justifiable. The case was clearly one for the jury under these facts. The killing being admitted or proved beyond a doubt to have been done by the appellant, the burden of justifying his act or reducing the crime to that of manslaughter was upon him. *State v. Ware*, 58 Wash. 526, 109 Pac. 359; *State v. Clark*, 58 Wash. 128, 107 Pac. 1047, and cases there cited.

Appellant next argues that the court erred in defining murder in the first and second degrees, for the reason stated, that there was no evidence of premeditation or design. These elements of the crime might well be inferred from the circumstances above stated. It is not necessary that there should be direct and positive evidence of either premeditation or malice. This is elementary.

Appellant next argues that the court erred in permitting the shirt worn by the deceased at the time he was killed to be received in evidence. The shirt was clearly and positively identified as the one worn by the deceased at the time he was killed. It was therefore properly received. *State v. Cushing*, 14 Wash. 527, 45 Pac. 145, 53 Am. St. 883; *State v. Churchill*, 52 Wash. 210, 100 Pac. 309. When this evidence was offered and received, no objection was made that the shirt was not in the same condition at that time that it was when removed from the body.

It is argued that the court erred in permitting the physician who examined the deceased after death, and who described the wound in detail, to state in his opinion how far the deceased would walk after receiving the wound. This was clearly competent. 17 Cyc. 73; *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315.

After defendant had denied on cross-examination that he and his codefendants while in jail had rehearsed their testimony to be given in the trial of the case, a witness was called in rebuttal to show that this statement of the defendant was untrue; that he had rehearsed his testimony while in the jail.

This was a matter affecting his credibility, and therefore proper and within the discretion of the trial court. *State v. Klein*, 19 Wash. 368, 53 Pac. 364; *State v. Bailey*, 67 Wash. 336, 121 Pac. 821.

We find no error. The judgment is therefore affirmed.

CHADWICK, FULLERTON, ELLIS, and CROW, JJ., concur.

[No. 10344. Department Two. September 18, 1912.]

SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

STREET RAILWAYS—RIGHT OF WAY—DEEDS—CONSTRUCTION. Deeds or contracts for a street railroad right of way, providing for the execution of such further grant as may be necessary after the construction of the road, are merged in a subsequent right of way deed given in pursuance of the former contracts, and referring to an unrecorded plat which dedicated streets and reserved a right of way therein as given in the subsequent deed; especially where such deed leased the right to maintain the road as already constructed until the street should be graded, at which time the deed required the company to remove its tracks to the graded street.

SAME—RIGHTS BY PRESCRIPTION—PERMISSIVE USE. In such case, the use of the lands on which the road was constructed, was a permissive use, and the payment of taxes thereon by the railroad company does not indicate an adverse holding.

DEDICATION—PLATS—STREETS — VACATION — NONUSER — RIGHT TO QUESTION—ESTOPPEL — STREET RAILWAYS — EASEMENTS. A railroad company having only an easement in a street, cannot object to grading the street on the ground that the street was abandoned by five years' nonuser and failure to open it, the abutting property owners not objecting; and the company having accepted an easement in the street and agreed to move its tracks thereto when the street was graded, it is estopped to question the right to grade the street.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered August 22, 1911, in favor of

[1]Reported in 126 Pac. 531.

the defendant, after a trial on the merits before the court, in an action for an injunction. Affirmed.

Preston & Thorgrimson, for appellant.

James E. Bradford, Howard D. Hughes, and *Ralph S. Pierce*, for respondent.

MOUNT, J.—The plaintiff brought this action to enjoin the city of Seattle from grading Rainier avenue and filling upon the roadbed and tracks of the railway of the plaintiff from a point on Fifty-seventh avenue north, in said city, along Rainier avenue southward for a distance of about one mile, to the city limits. The complaint is based upon allegations to the effect that the city has no right to grade the avenue, and that such grade would damage the plaintiff company. At the conclusion of the trial in the court below, the relief prayed for was denied, and a judgment was entered for the defendant. The plaintiff has appealed.

It appears from the evidence in the case that, on March 18, 1889, Charles Waters, who then was the owner of the land upon which appellant's railway is now located, granted to Andrew C. Thompson and his assigns the right to construct a suburban railroad across his land to a point on Lake Washington. A certain time was fixed within which the line should be definitely located, and it was agreed that, as soon as the road was located and constructed over the premises, Mr. Waters would execute "such further grant or right of way as shall be necessary for the security of said Andrew C. Thompson or his assigns." A part of the road was thereafter constructed. Mr. Waters, on June 18, 1891, platted his land into lots, blocks and streets. The plat was designated Rainier Beach. The dedication recited that the streets, etc., were dedicated to the use of the public forever, "except in so far as may be affected by the right of way granted to the Rainier Avenue Electric Railroad Company by deed of even date herewith." Rainier avenue was designated on the

plat as a street eighty feet in width. On the same date, Mr. Waters executed a deed to Rainier Avenue Electric Railway Company, the predecessor of the appellant. This deed granted to the railway company,

"A right of way and strip of land thirty feet in width, lying one-half thereof on each side of the center line of Rainier avenue, and extending the whole length thereof in the unrecorded plat of Rainier Beach, as surveyed by Thompson and White, this day dedicated by Charles Waters. This conveyance, so far as affects that part of Rainier avenue extending from the present terminus of the Rainier Avenue Electric Railway to the eastern boundary of said Rainier Beach, is conditional upon the said party of the second part, its successors and assigns, building or causing to be built thereon a single or double track of railway within fifteen years of date hereof. The party of the first part does hereby, for the sum of one dollar and other valuable considerations, receipt whereof is hereby acknowledged, lease unto the said party of the second part, its successors and assigns, a strip of land thirty feet in width lying one-half thereof on each side of the center line of the railway of said second party as now located and constructed through and along the lands embraced in said unrecorded plat of Rainier Beach until Rainier avenue adjacent thereto shall have been graded, when this lease shall terminate. It is agreed that in the event of the said party of the second part, its successors and assigns, constructing a railway from the present Lake Washington terminus of said Rainier Avenue Electric Railway to the easterly boundary of said Rainier Beach, it may be built within the bounds of Rainier avenue over the most convenient course thereon until such time as said part of said Rainier avenue shall have been graded, when such railway is to be moved to within the bounds of the right of way and strip of land thirty feet in width heretofore granted."

This deed was accepted by the railroad company and placed of record, and the road was constructed, following the general course of Rainier avenue, but not within the thirty-foot strip. It followed the avenue in places, crossed it in other places, and in certain places was wholly without the avenue. After the railway was thus constructed and

in operation in the year 1907, the territory embraced within the plat of Rainier Beach was annexed to the city of Seattle. Thereafter, and in 1910, the city of Seattle, by ordinance, provided for grading the westerly twenty-five feet of Rainier avenue and other streets. Ordinances were also passed fixing the grades of these streets. In some places these grades upon Rainier avenue varied in depth from eight to sixteen feet. The grading of these streets and avenues will necessitate the removal of the railway tracks upon the thirty-foot strip described in the deed as above stated, and will interfere with the operation of the railway, and will necessitate the expenditure of a large amount of money, estimated at $50,000, to place the railway within the thirty-foot right of way. The city is threatening to grade this street upon the grade proposed by the ordinances. Appellant claims that it has a right to have its railway tracks remain undisturbed, for the following reasons:

"(1) By virtue of the right of way deeds executed March 18, 1889, by the owner of the land, Charles Waters, and afterwards assigned to the Rainier Avenue Electric Company; (2) by virtue of the deed from Charles Waters, dated June 18, 1891, to the Rainier Avenue Electric Company, and the reservation contained in the plat of Rainier Beach, filed September 24, 1891; (3) by virtue of having taken possession of and appropriated the land, and having remained in possession thereof without objection from the owner, of a portion of the road for a period of more than twenty years, and of the remainder for a period of more than fifteen years, and during such time having been assessed and paid taxes upon its right of way as a railroad company."

The deeds of March 18, 1889, show upon their face that they were contracts for a right of way. At that time the road was not constructed and was not definitely located across the land of Mr. Waters. The deeds were conditional upon the beginning of construction within a given time. They also provided that, when the road was located and constructed, the grantor would "execute such further grant or

right of way as shall be necessary for the security of said Andrew C. Thompson or his assigns." These deeds were never recorded. Afterwards the deed of June 18, 1891, above quoted from, was executed, delivered and recorded. This latter deed was given in accordance with the provisions of the former deeds, and the whole contract was merged in the latter deed. This latter deed was executed on the same day that the plat of Rainier Beach was dedicated. It was referred to in that dedication. The deed upon its face refers to the unrecorded plat of Rainier Beach, and grants a right of way thirty feet in width upon the center of Rainier avenue described by that plat.

It seems plain that the grantee took with notice of the plat and by virtue of the deed, and that the provisions of the former contracts or deeds were merged in the latter deed. Mr. Waters, no doubt, might grant such right of way as pleased him over his own land. Conceding that he could, at the time he dedicated the street to the public, reserve or grant to the railroad company a perpetual easement in the center of the street for a right of way for a railroad, he could also attach such conditions thereto as the parties might agree upon, and which might not affect the reasonable use of the street by the public. The parties did so agree, and stated in the deed which contained the agreement that the railroad "may be built within the bounds of Rainier avenue over the most convenient course thereon, until such time as said part of Rainier avenue shall have been graded, when such railway is to be moved to within the bounds of the right of way and strip of land thirty feet in width heretofore granted." This deed, in short, provided that the railway might occupy the land upon which it was then constructed, until such time as the avenue was graded, when it should be removed to the thirty-foot strip. There can be no escape from the conclusion that the prior deeds and their provisions were clearly merged in the latter deed which was accepted by the railway company, and that company and its successors are bound

by its provisions. The use of the land upon which the railroad was constructed was a permissive use by the terms of the deed. The fact that taxes were paid upon the right of way by the railway company did not change the nature of that use or indicate an adverse holding.

It is argued by appellant that Rainier avenue has been vacated by operation of law, for the reason that it was not opened or cleared as a street within five years after the plat was filed. *Murphy v. King County*, 45 Wash. 587, 88 Pac. 1115, is cited to sustain this contention. The appellant in this case cannot raise that question, because it does not own the street or property abutting upon the street. Appellant has only an easement within the street. This street is within the corporate limits of the city of Seattle. If the property owners along the street consent thereto, or make no objection, the city has undoubted right to improve the street. The appellant, having accepted an easement upon the street and agreed to remove its tracks thereon when the street is graded, is estopped to question the right of the property owners or the city to make the grade. We are satisfied, therefore, that the trial court properly denied the relief sought.

The judgment is affirmed.

CHADWICK, FULLERTON, ELLIS, and CROW, JJ., concur.

[No. 10211. Department Two. September 18, 1912.]

N. S. EOFF, *Respondent*, v. SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, *Appellant*.[1]

DAMAGES—PERSONAL INJURIES — MEASURE OF DAMAGES — DEPENDENT FAMILY. In an action for personal injuries, it is not prejudicial error to allow the plaintiff to state that he is a man of family, consisting of a wife and three children, where it was not accompanied by proof of dependency of the family; as it is of a preliminary nature and weighs upon his credibility and good faith.

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. In a personal injury case, error, if any, in permitting the plaintiff to testify that he had a wife and three children is not prejudicial, where it was shown by other evidence that he had a home and wife.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. Where a verdict for $10,000 for personal injuries resulting in traumatic neurasthenia was set aside as excessive, and on a retrial, a like verdict was rendered, the liability being admitted and the sole issue being the amount of damages, and it was not contended that the injuries were trivial, the verdict should not be set aside as excessive, when supported by plaintiff's evidence and by part of the expert witnesses.

Appeal from a judgment of the superior court for Klickitat county, McKenney, J., entered November 3, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger through the derailment of a train. Affirmed.

Carey & Kerr, *Charles A. Hart*, and *A. L. Miller*, for appellant.

E. C. Ward, *N. L. Ward*, and *W. H. Wilson*, for respondent.

FULLERTON, J.—The appellant is a common carrier, and owns and operates with other lines a line of railroad extending between the towns of Goldendale and Lyle, in Klickitat county, in this state. On February 10, 1910, the respondent

[1]Reported in 126 Pac. 533.

was riding as a passenger on one of the appellant's trains passing between the towns named, when a derailment occurred, caused by some fault in the equipment. The car on which the respondent was riding overturned, and the respondent fell or was thrown from one side of the car to the other. He struck upon his neck and shoulders and received, as he claims, severe and permanent injuries. This action was brought to recover for the injuries so received. After issue had been joined on the complaint, a trial was had before the court and a jury, which resulted in a verdict in plaintiff's favor for the sum of $10,000. The appellant moved against the verdict on the ground that it was not sustained by the evidence, being grossly excessive, and appeared to have been rendered under the influence of passion and prejudice. The trial court thought the verdict excessive, and gave the respondent the option of taking a judgment of $5,000 or submitting to a new trial. The respondent submitted to a new trial, and again a verdict was returned in his favor for the sum of $10,000. This verdict was likewise moved against by the appellant on the ground, among others, that it was grossly excessive and appeared to have been rendered under influence of passion and prejudice. This motion the trial court overruled, and entered a judgment in the respondent's favor for the amount of the verdict. This appeal followed.

In this court the appellant makes two principal assignments of error. It contends first, that the court erred in permitting the respondent to testify that he had a family and that it consisted of his wife and three children; and second, in refusing to set aside the verdict on the ground that damages awarded were excessive and appeared to have been given under the influence of passion and prejudice.

As to the first assignment of error, it is a general rule, we think, that the damages that may be recovered in an action for personal injuries must be confined to the actual injuries suffered by the complainant, and cannot be augmented

by showing that others will suffer because of the injury also, as that the complainant had a family, or relatives, or other persons dependent upon him for support. Cases can be found, also, which hold it reversible error in such cases to permit the introduction of evidence showing that the complainant had a family, even without the showing that they were dependent upon him. See, note to *Youngblood v. South Carolina etc. R. Co.*, 85 Am. St. 824, 835. The case at bar, it will be observed, is distinguishable from the general rule stated in that no attempt was made to show that the complainant's family was dependent upon him for support. He was asked whether or not he was a man of family, and on his answering in the affirmative, was asked of whom his family consisted. Here the examination on this subject ended; he was not asked concerning their situation financially, and so far as the record discloses, they may all be in that respect independent of any effort of his.

The rule of the cases holding such evidence, whether or not accompanied by the proofs of dependency, inherently prejudicial, we do not think is sound. Such evidence is in its nature preliminary. It is to be classed with that character of testimony introduced as explanatory of the situation of the parties, their character and conduct, thus enabling the jury to better apply the evidence bearing directly upon the subject of the litigation. In this very case, for example, the respondent was questioned by his counsel, and allowed to answer without objection from the other side, concerning the length of time he had resided at his then residence, where he had formerly resided, and the length of time he had resided at the places he mentioned, the different trades and businesses he had pursued for gaining a livelihood, and his occupation at the time he was injured. These facts clearly had no bearing upon the immediate question of the respondent's injuries, and if the cause and effect of such injuries were the sole inquiry, were utterly immaterial. Yet it will be recognized by all practitioners that no unusual course was

here pursued. The purpose of the testimony was to give the jury some idea of the habits, character, and standing of the plaintiff, that they might better weigh the credibility of his testimony and judge of the good faith of his complaint. The inquiry concerning the family has a similar purpose, and where it is not accompanied by proof of dependency of the family, we do not think it reversible error to admit it.

The question in this case, however, can be rested on much narrower grounds. The facts here thought to be objectionable were practically all disclosed by the evidence introduced to prove other facts, and which from its nature could not be excluded. The plaintiff while testifying to his injuries and the suffering that followed therefrom necessarily referred repeatedly to his "home;" his wife was a witness in his behalf and necessarily testified to her relationship to him; a physician, called by the defendant while being questioned by its counsel in explanation of his business relationship to the plaintiff, testified that he had at one time been the plaintiff's family physician. The only fact testified to by the respondent not disclosed by this evidence is the number of his children. That he had a home, a wife, and was a man of family was plainly disclosed. To show further that there were three children in his family, we can hardly think calls for reversal.

In our determination of the question under discussion, we have not relied on the case of *Starck v. Washington Union Coal Co.*, 61 Wash. 213, 112 Pac. 235. In that case one of the reasons given for upholding the verdict against the claim of excessiveness was that the injured party had a wife and five children dependent upon him for support. Lest it be thought that we thereby sanctioned this character of proof as proper for the purpose of enhancing damages, we take this opportunity to say that such was not our intention. The weight of authority and the better reason is with the rule that evidence of the fact that the injured person has a family or other persons dependent upon him for support is

inadmissible for the purpose of enhancing damages, and we did not, in the case cited, intend to depart from the rule.

The further assignment, namely, that the verdict is excessive and appears to have been given under the influence of passion and prejudice, we likewise think is not well taken. There have been two trials of the facts before juries, each leading to the same result. The first verdict was set aside by the trial judge on the sole ground that it was deemed by him excessive, and the plaintiff given the option to take a judgment for one-half of the sum returned by the jury or submit to a new trial. He chose to submit to a second trial, and we are now asked to compel him to accept a less sum than the jury returned in this second verdict or submit to a third. But without specially reviewing the record, we do not think it requires a further trial. It must be remembered that the character of the accident was such as to preclude any defense on the part of the appellant as to its liability therefor, and it is not contended that the injuries inflicted on the respondent were so far trivial as not to warrant a recovery for something more than nominal damages. The question of the amount that should be awarded is therefore solely one for the jury, and neither the trial court nor this court has the right to substitute its judgment for that of the jury as to the amount of such award. When, therefore, there have been two trials of the same issue on questions solely within the province of the jury with the same result, courts rightly hesitate to interfere therewith. *Buyken v. Lewis Construction Co.*, 59 Wash. 220, 109 Pac. 608; *Caldwell v. Northern Pac. R. Co.*, 62 Wash. 420, 113 Pac. 1099.

The respondent's ailment as diagnosed by that of his physician is traumatic neurasthenia. If his own story of his condition be true he is a physical wreck, unable to pursue his usual avocation, or to pursue any avocation that requires physical strength or physical endurance. It was the evidence of all the witnesses who testified on the subject that he had not done any effectual work since his injury, and the evi-

dence of one of them, who gave him employment for a short time thinking thus to assist him, was that he was unable to do physical labor. The expert witnesses disagreed as to his condition. His own supported his contention, those of the appellant opposed them, giving it as their view that the respondent was shamming. On this state of the record, it seems to us that it would be an injustice to order a new trial, even though a lesser verdict would be more in consonance with our own ideas of the record.

The judgment is affirmed.

MOUNT, PARKER, and ELLIS, JJ., concur.

[No. 10366. Department Two. September 23, 1912.]

MARY H. THURSTON *et al.*, *Appellants*, v. HYMAN COHN *et al.*, *Respondents*.[1]

FRAUD — FALSE REPRESENTATIONS — ACTION FOR DAMAGES — EVIDENCE — SUFFICIENCY. The evidence does not warrant the rescission of a sale of hotel fixtures on account of fraudulent representations by the seller as to the expense of running the hotel and the cost of the fixtures, where wilful misstatements are not shown, the average cost was correctly stated, without any considerable variation, and the estimated expenses depended largely on individual care and economy, and there was no attempt to show that the defendants did not pay for the fixtures the stated cost.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 17, 1912, dismissing an action for damages for fraud, upon withdrawing the case from the jury. Affirmed.

Samuel R. Stern, for appellants.

Samuel Edelstein, for respondents.

PER CURIAM.—On October 1, 1910, the respondent Cohn held a lease on a hotel, situated in the city of Spokane,

[1]Reported in 126 Pac. 537.

which lease extended over a period of years. The lease was of the naked property, and they had theretofore furnished the hotel on their own account at a considerable expense. On the day named, they entered into a contract of sale with the appellants, by the terms of which they agreed to sell them the hotel furnishings and to assign to them the lease for a consideration of $16,000, some six thousand dollars of which was to be paid in property which the appellants agreed to deed to them, and the balance in monthly installments of $200 each, the title to pass on the completion of the payments. A deed was executed to the respondents of the property agreed to be taken in exchange, and a conditional bill of sale given by them of the personal property, to evidence the further agreement. The appellants entered into possession of the property, and operated the hotel until about the middle of January, 1911, when they abandoned it on notice served upon them to quit or pay the rent; they having failed to pay to the owner of the property the rent for the month of January, which, by the terms of the lease, was payable in advance.

Immediately after abandoning the premises, the appellants brought the present action to recover in damages the losses sustained by them because of the adventure. They alleged that they were induced to enter into the contract by certain representations made to them by the respondents concerning the value of the hotel fixtures, the costs of running the business, and the earnings thereof, which representations they further allege were false and fraudulent and known to be such by the respondents at the time they were made, and further that they were made to induce the appellants to purchase the property that respondents might be relieved of an unprofitable and undesirable investment. Issue was taken on the allegations of the complaint, and a trial entered upon by the court sitting with a jury. At the conclusion of the appellants' case in chief, the court took the case from the jury on the challenge of the respondents to the sufficiency of the

evidence, and entered a judgment to the effect that the appellants take nothing by their action. This appeal is from the judgment so entered.

The principal question is the sufficiency of the evidence to make a case for the jury, and we have examined the record with care to ascertain whether there was error in the ruling of the court to the effect that there was not such evidence. The case is one presenting somewhat peculiar hardships, as the appellants have lost in the venture the somewhat snug little fortune they invested in it. But we are unable to discover that the fault for this lies with the respondents. It is true that, in the course of the negotiations leading up to the sale, they made a number of representations concerning matters of fact, and expressed opinions upon the probable success of the venture, but we find in none of them anything that indicates wilful falsehood or fraud. In so far as the representations as to the facts were concerned, they proved to be in the main substantially correct; at least, there was no such serious errors as to imply any wilful misstatement. They relate chiefly to the expense of operating the hotel, and in some instances the actual cost of certain items proved to be greater than the estimated cost of the same, but there was no considerable variation, and it is not shown that the respondents did not correctly state the average cost of like items during the time they conducted the business. Moreover, the actual operating expenses, those properly chargeable as such during the several months the appellants were in the business, proved not much greater than the estimated expenses. It will not be forgotten that the expenses of the character here in question are not fixed charges, but vary from month to month, and depend largely upon the care and economy of the individual by whom they are incurred. So with the representations as to the cost of the furnishings. While the appellants made some attempt to show that they were of less value than the stated costs, they made no effort to prove that

the respondents did not pay for them the amount they stated they so paid.

But it is needless to pursue the inquiry. We are satisfied that the court correctly interpreted the evidence. Affirmed.

[No. 10127. Department Two. September 23, 1912.]

R. A. THAYER, *Appellant*, v. HENRY HARBICAN, *Respondent*.[1]

ATTORNEY AND CLIENT—CONTRACT OF EMPLOYMENT—MEETING OF MINDS—RECOVERY ON QUANTUM MERUIT. Where duplicate copies of a contract employing an attorney do not correspond as to the amount of compensation, one containing an interlineation, which was not specially called to the attention of the signers, and it is admitted that both copies were signed by the parties, in the absence of evidence of any meeting of the minds upon the disputed clause, there can be no recovery on the contract upon the point in issue, and the attorney performing the service is entitled to recover only upon *quantum meruit*.

PLEADINGS—AMENDMENTS TO CONFORM TO PROOF. Upon failure of proof as to the terms of a contract of employment, the complaint should be deemed amended to conform to proof of *quantum meruit* for the services performed.

MORTGAGES—FORECLOSURE—ATTORNEY'S FEES—REASONABLENESS—ESTOPPEL. Under Rem. & Bal. Code, § 475, limiting the amount which a mortgagee may collect as an attorney's fee to a reasonable sum, the mortgagee, on collecting a fee, is estopped to assert as against his attorney, that the sum collected was unreasonable.

ACCORD AND SATISFACTION—CHECK IN FULL PAYMENT. A check given in full but retained with notice to the drawer that it would be applied on account only, does not constitute an accord and satisfaction, where there could be no *bona fide* dispute between the parties as to the sum that was due.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered May 19, 1911, upon the

[1]Reported in 126 Pac. 625.

verdict of a jury rendered in favor of the defendant, in an action on contract. Reversed.

Belden & Losey, for appellant.

Benson Wright, for respondent.

ELLIS, J.—This action was brought to recover an attorney's fee upon what the plaintiff claims was the written contract of employment. The defendant admitted employing the plaintiff under a written contract, but set up a different contract from that claimed by the plaintiff. The cause was tried to a jury. A verdict was returned in favor of the defendant. The plaintiff's motion for a new trial was overruled. From a judgment entered upon the verdict, the plaintiff has appealed.

It is admitted that the appellant, an attorney of Colville, Washington, was employed by the respondent to foreclose two mortgages, aggregating about $6,000, held by the respondent upon certain real estate situated in the town of Newport. The contract which the appellant claims was the real written contract of employment, and which was produced by him at the trial, was typewritten, excepting the date, the name of the appellant, the names of the mortgagors, the description of the mortgaged property, the signatures of the parties, and the italicized words in that part of the writing fixing the appellant's compensation on three contingencies, which reads as follows:

"(1) In case said action is settled prior to judgment, said first party is to receive *fifteen* per cent of amount for which the action is settled.

"(2) In case of foreclosure and sale of said property, and due confirmation of the sale, said first party is to receive *twenty-five* per cent of the attorney's fees allowed by the court in said action.

"(3) In case of foreclosure and sale of the said property, and the second party is required to purchase the same in order to protect his interest, then said first party is to receive *twenty* per cent of the attorney's fees allowed by the

court in said action. Above provisions as to attorney's fees for services shall apply to all courts."

It is admitted that it was the intention of both parties to execute the contract of employment in duplicate, so that each might have one of the duplicates. The contract produced by the respondent, and which he claims was the real written contract of employment, was in all respects like that produced by the appellant, save that the words "of attorney's fees" which we italicize appeared in the following clause by interlineation with a pen.

"(1) In case said action is settled prior to judgment, said first party is to receive fifteen per cent of amount *of attorney's fees* for which the action is settled."

It is also admitted that, when the respondent went from his home in Spokane to Colville to negotiate for the employment of the appellant, he took with him the two typewritten forms for contract, but the respondent testified in effect that he had, prior to that time, interlined the words "of attorney's fees" in one, and failed to do so in the other. Both parties testified that the contracts, save these words, were filled out by the appellant in his office in Colville in the respondent's presence. The appellant testified that the interlined words "of attorney's fees" were not in either of the contracts when he and the respondent signed them in his office. Both parties admitted their signatures to both contracts. The respondent, when shown the contract produced by the appellant, admitted that it was in the same condition as when he and the appellant signed it, but insisted that the contract which he himself produced was also in the same condition as when he and the appellant signed it. Both admitted the mutual delivery of the papers on the day of their date, October 25, 1910.

The appellant entered upon the employment, filed a complaint for foreclosure of the mortgages, and placed a summons thereon in the hands of the sheriff for service. The mortgagor, learning of this, made overtures for settlement,

and a settlement was arranged through the appellant whereby the mortgagor paid to the respondent the sum of $6,869.97, including the principal and interest of the notes secured by the mortgages, the taxes and insurance premiums paid or incurred by the mortgagee and interest on these sums, court costs and other expenses and an attorney's fee of $300. The respondent agreed to this settlement in a letter written to the appellant closing with the following agreement:

"I agree to turn over to Mr. R. L. Rutter of Spokane, Washington, the cancelled mortgages and notes sued upon, the abstract to the property, the insurance policy held by me and releases of the mortgages herein sued upon . . . . upon Mr. Rutter paying to me the amount above stated as settlement made by you with Mr. Fiedler, and I further agree to pay you the commission as stated in our contract of October 25, 1910, and upon receiving same you are to dismiss the above entitled cause of action."

The appellant set up this agreement as confirming the contract of employment which he produced at the trial. The respondent answered that this agreement was coerced by the appellant, in that he threatened to dismiss the foreclosure suit if the respondent did not sign it. Whether this promise was coerced or not, it cannot be construed as a confirmation of the contract as claimed by the appellant. It does not appear that at that time any question had arisen as to what the contract was. The promise might refer as well to the contract as claimed by the respondent as that claimed by the appellant. It has no probative effect as to what the contract really was.

It must be admitted that the disputed clause, as it appears in the writing produced by the respondent, makes the entire contract more homogenius and consistent. It makes the clause more in keeping with the two succeeding clauses, since it provides the smallest fee for the least work and makes it a percentage of the fee recovered as is the case in the other two contingencies. It cannot be successfully argued

that the largest fee would be provided in case of a settlement because the respondent might not want the land but might prefer the money, since the second contingency provided for, which evidently relates to a purchase by a third party at foreclosure sale would also give the respondent his money; yet in that contingency the writings produced by both parties provided for a percentage of the fee allowed by the court in the foreclosure action, which percentage would obviously be much less than that provided in the writing produced by the appellant for the contingency of a settlement before judgment.

On the other hand, the appellant testified, and the respondent admitted, that the writing produced by the appellant had not been changed but was in exactly the same condition when produced at the trial as when the appellant signed it. But for this admission, the question as to which was the true contract of the parties might properly have been submitted to the jury. The respondent does not claim that he called the interlineation in his own copy of the writing to the attention of the appellant While both parties testified that the terms of the employment were discussed before the papers were signed, neither party testified to what was said in arriving at an agreement, so that we have nothing further than the writings themselves to show what was the real intention or agreement of the parties. There was absolutely no evidence of a meeting of the minds of the parties on the subject-matter of this disputed clause. There was no evidence to sustain a finding by the jury that there was any contract as to the amount of the attorney's fee to be paid to the plaintiff in case of settlement of the foreclosure suit before judgment. But the plaintiff performed the service. He effected the settlement. He is entitled to the reasonable value of his services. Having failed in this action to establish the express contract, he can still maintain another action upon the *quantum meruit* for the same services. The judgment in this action is not a bar to such an action, since

it requires different evidence to establish the two causes of action. *Buddress v. Schafer*, 12 Wash. 310, 41 Pac. 43.

In the record before us, however, we have indisputable proof as to what was the reasonable value of the services. It is found in the amount exacted from the mortgagor by the appellant with the respondent's approval. Both parties admit that $300 was collected from the mortgagor as an attorney's fee, and that the respondent has received that sum as an attorney's fee. The appellant had no right to exact that sum and the respondent had no right to receive it, except as a reasonable attorney's fee for the work done. They are both, under these circumstances, estopped to say that the amount so exacted and paid was not the reasonable value of the attorney's services. The rights of the parties being thus established by the admitted facts, the plaintiff was entitled to judgment, as a matter of law. The trial court should have directed an amendment of the complaint to conform to these facts, instructed a verdict for the plaintiff for $244, being the amount of the attorney's fee collected, less $56 which it is admitted the respondent has paid to the appellant, and entered judgment accordingly.

But the respondent claims a further defense. He pleaded and sought to prove a settlement with the appellant in full. After the settlement of the foreclosure suit and payment to the respondent of the mortgage debt, he mailed to the appellant a check for $50 bearing the words, "This is payment in full for your services in the case of Harbican v. Feidler dated about October 25, 1910." The appellant drew a line through this, wrote in its stead, "Accepted only as part payment of atty fees in case of Harbican v. Feidler," cashed the check, and wrote to the respondent quoting the disputed clause in the writing claimed by him to be the contract and stating:

"I will give you credit on account for $50 as per your check of 21st inst, and also $6 balance due on account of money advanced as costs and not used, making a total credit

to you in the sum of $56 and leaving a balance due me as per the terms of our agreement of $973.89."

The respondent contends that the retention and cashing of this check constituted an accord and satisfaction and that the jury should have been so instructed. This contention cannot be sustained. While a valid contract might have been made between the parties here as attorney and client for more than the amount exacted from the mortgagor as an attorney's fee, no valid contract could have been made which contemplated less. Since the act of 1895 (Laws of 1895, p. 81; Rem. & Bal. Code, § 475), the amount of the attorney's fee which may be collected from a mortgagee is no longer the subject of binding stipulation in the mortgage or note, though prior to that time it was. Since that act, a reasonable fee only can be exacted in any event, and manifestly no sum larger than that received by the attorney would be a reasonable fee. Any other construction of that statute would allow the attorney's fee collected from the mortgagor to be made a cloak for usury. In any event, therefore, the respondent having collected $300 as an attorney's fee, was estopped to claim it or any part of it as his own. There could, hence, be no *bona fide* dispute that that sum at least was due to the appellant. The rule that where a claim is in dispute and the debtor sends a check to the creditor for a less sum, indorsed as payment in full of the claim, the retention of the check by the creditor constitutes an accord and satisfaction, has no application to the case here presented. That rule only applies where the claim is disputed in good faith, and only as to the part of the claim so disputed. This case falls directly within the rule announced in *Seattle, Renton & Southern R. Co. v. Seattle-Tacoma Power Co.*, 63 Wash. 639, 116 Pac. 289. In that case the $1,000 minimum charge for electrical current each month was admittedly due. The retention of that sum, though claimed as a payment in full, could not constitute an accord and satisfaction. Up to that amount, there could be no *bona fide* dispute. The

following from our opinion in that case (page 645) makes the distinction plain:

"Neither could it be an accord and satisfaction, because the power company had an absolute right to receive this sum each month from the railway company. It may or may not have been entitled to more, but its absolute right to this sum was disputed by no one. Appellant's letter of November 28, 1906, is a clear recognition of this situation, when it says, 'It has been decided by the company to stand by the offer made by me of paying the amount designated in our contract as the minimum amount, namely $1,000 per month.' An offer to pay the confessed minimum amount due can hardly be construed into a payment of the maximum amount due, nor as a payment in settlement of the whole controversy."

The same is true here. The respondent having collected from the mortgagor $300 as an attorney's fee, could not dispute the attorney's right to that amount. Up to that amount, the claim was thenceforth liquidated and indisputable. The acceptance thereafter of a less sum by the attorney could not form the basis of or operate as a consideration for an accord and satisfaction.

It would be an idle thing to send this cause back for a new trial when, as we have seen, the admitted facts have established appellant's right, as a matter of law, to a judgment for a balance of $244. The judgment is reversed and the cause is remanded with direction to permit an amendment of the complaint to conform to the facts and enter judgment for the appellant in that sum.

MOUNT, C. J., FULLERTON, MORRIS, and CROW, JJ., concur.

[No. 10278. Department Two. September 23, 1912.]

The State of Washington, *on the Relation of Charles F. Craig, Appellant*, v. The Town of Newport *et al.*, *Respondents.*[1]

Pleading—Answer—Conclusions—Certainty. In an action to compel a town to levy a tax to meet warrants issued in payment of a lease, an answer that the lease was for the purpose of securing a water supply without the sanction or authority of the qualified voters of the town, and that the lease was therefore void, pleads a fact and not merely a conclusion, and is sufficiently definite and certain to be proof against demurrer.

Municipal Corporations—Public Improvements—Water Supply—Submission to Voters. Under Laws 1901, page 177, providing that the council shall by ordinance submit to the voters any plan for providing the town with water works, no expenditures for a municipal water supply can be incurred until the plan has been submitted to and received the assent of the voters of the town, whether the sum be within or without the first constitutional limit of indebtedness; and the legislature had power to so provide.

Same—Ultra Vires Contract—Ratification—Estoppel. Where the town authorities had no authority to provide for a municipal water supply without submitting the plan to the electors, their action in leasing springs for that purpose without submitting the matter to a vote is *ultra vires*, and acceptance of benefits under the contract is not a ratification which would estop the city from disputing the indebtedness unlawfully incurred.

Appeal from a judgment of the superior court for Pend Oreille county, Miller, J., entered January 10, 1912, upon findings in favor of the defendants, dismissing an action in mandamus to compel the levy of a tax. Affirmed.

Belden & Losey, for appellant.

Sidney W. Rogers (*Fred Trumbull*, of counsel), for respondents.

Ellis, J.—This action was brought to compel the town of Newport, by mandamus, to levy a tax to create an indebted-

[1]Reported in 126 Pac. 637.

ness fund for the payment of sixteen warrants of $100 each, issued to one C. A. Carter in payment for a ninety-nine year lease of three acres of land situated in Bonner county, Idaho, and of the springs and water supply thereon.

There was no serious dispute as to the facts. The warrants were issued April 5, 1907, and were presented to the town treasurer and by him indorsed "not paid for want of funds," on May 8, 1907. Thereafter they were transferred to the relator for value. It sufficiently appears from the offer to lease, and from the recitals in the lease itself, that the purpose was to secure a new source of water supply for the town. It also appears that the town was at the time and still is supplied from another source by a private water system operated under a franchise, the town having the right under the franchise to purchase that system at any time within a certain period. It is admitted that the town council attempted to authorize both the securing of the lease and the issuance of the warrants in payment therefor merely by resolution. Neither of these matters was submitted for rejection or approval to the qualified voters of the town, by ordinance or otherwise. No ordinance was passed adopting any proposed plan or system, or declaring the estimated cost thereof, or submitting any plan or cost to the voters for ratification or rejection, at either a general or special election.

The answer of the defendants, after denying the principal allegations of the complaint, admitted the refusal to create an indebtedness fund for payment of the warrants, and set up as an affirmative defense the fact of the prior water supply and the optional right of the town to purchase the same, and alleged:

"That the leasing or purchase of the aforesaid water supply and tract of land from the said C. A. Carter and the purported issuance of the said warrants and the payment thereof, would be a needless, useless and uncalled for investment, outlay, and expenditure of the funds or money of the said town of Newport, and its citizens, and was without sanction or

authority of the qualified voters of said town; that the said tract of land and water supply attempted to be leased as aforesaid is without the state of Washington and lies within the county of Bonner and state of Idaho; and that the attempted purchase thereof by the council of said town was contrary to the law, ordinances of said town, and rules of said council, and void."

It was further alleged that, by reason of the foregoing, the agreement of lease, in consideration of which the warrants were issued, was *ultra vires*, null and void, and that the warrants were and are void and not binding upon the town. Prior adjudication of the matters in issue was pleaded as a second defense. A demurrer to these affirmative defenses was sustained as to the second, and overruled as to the first. A trial was had to the court, which found the facts substantially as hereinbefore set out, and thereon held the warrants void, and entered judgment for the defendant. The plaintiff has appealed.

The appellant contends that the demurrer to the first affirmative defense should have been sustained, on the ground that it stated no facts constituting a defense, but only conclusions. It stated, in effect, that the lease was for the purpose of securing a water supply, and that the leasing of the land and springs and the issuance of the warrants in payment were without the sanction or authority of the qualified voters of the town. This presented the ultimate fact which constituted the real issue in the case. Under the liberal rule imposed by the statute (Rem. & Bal. Code, § 307), this defense must be held sufficiently pleaded, in the absence of a motion to make the allegations more specific. The demurrer to this defense was properly overruled.

The only question upon the merits presented for our decision is well expressed in the appellant's brief as follows:

"It is admitted by the appellant that no election was called in this case and that no plans were submitted to the voters for adoption or rejection, and with these facts before the court the decision of this case becomes wholly a matter of law."

The appellant contends that, under Rem. & Bal. Code, § 7731, subd. 3, the council had full power to acquire the lease upon the property in question as a source of water supply for the town. That law was enacted by the legislature of 1890. At the same session, there was passed an act (Laws 1890, page 520, 1 Hill's Code, § 697), which has since been several times reenacted with amendments, and at the time of the transaction here in question, was in force, as amended by an act of 1901 (Laws 1901, page 177). The material part of the act so amended reads as follows:

"Whenever the city council or other corporate authority of any city or town shall deem it advisable that the city or town of which they are officers shall exercise the authority conferred upon them in relation to water works, sewerage, and works for lighting, heating, fuel and power purposes, or cable, electric or other railways, any or all thereof, the corporation shall provide therefor by ordinance, which shall specify and adopt the system or plan proposed and declare the estimated cost thereof as near as may be, and the same shall be submitted for ratification or rejection to the qualified voters of said city or town at a general or special election. Ten days notice of the purpose to submit such system or plan to be voted on at such election shall be given in the newspaper doing the city or town printing by publication in each issue of said paper during said time: Provided, That, if the said city or town is to become indebted and issue bonds or warrants for such water works, sewerage system, lighting, heating, fuel or power works or railways, the said proposition and authority to become so indebted shall be adopted and assented to by three-fifths of the qualified voters of said city or town voting at said election, except as to the adoption or rejection of the system or plan of said improvements, which may be adopted by a majority vote. When such system or plan has been adopted, and no indebtedness is to be incurred therefor, the corporate authorities may proceed forthwith to construct and acquire the improvements or lands contemplated, making payment therefor, from any available fund."

In order to give effect to this statute, it must be construed as limiting the power of the council in the premises to

an initiation and submission to the qualified voters, and as vesting in the voters the sole power to adopt the scheme, authorize the contract, and incur the debt. In *State v. Pullman*, 23 Wash. 583, 63 Pac. 265, 83 Am. St. 836, referring to these provisions, this court said:

"Under the provisions of §§ 696, 697, 1 Hill's Code, the law which was in force at the date of the contract, the town was prohibited from contracting for the extension of its water system without the approval of its citizens; and, where the extension or addition created an indebtedness, and in this case an indebtedness was contracted for,—it required the assent of three-fifths of the voters of the town. So that there can be no question but that the action of the town authority in entering into this contract was beyond the powers given it by law. In such case it is well settled that the plea of *ultra vires* may be interposed. In the discussion of this question, the distinction which is made between the application of the law to private corporations and its application to municipal corporations must be kept in mind, and this will eliminate from the discussion the most of the authorities cited by the appellant. This distinction is wisely maintained, for the authority of a private agent is known only to the agent and the principal, but the authority of the officers of a municipal corporation is a matter of public record, which is available to every one. The scope of their authority is embraced either in their charters or in the statutes of the state, and the limitation upon their powers is equally available to every one who desires to deal with them. Hence, if one, knowing their powers and limitations, sees fit to enter into illegal contracts, contracts which the law has forbidden for the protection of the taxpayers of the municipality, he has no right to complain when he is estopped from enforcing his illegal contract by a plea of *ultra vires* by the citizens of a municipality. If he knew the law and contracted in the face of that knowledge, he certainly ought not to recover; if he did not know the law as a matter of fact, he is subject to no greater hardship than has always been imposed upon the citizen, viz., the denial of the right to plead ignorance of the law on the theory that it was his duty to know it."

That opinion closes with the following unqualified statement:

"The power was conferred upon the voters. The city had authority only to put the machinery in motion which would elicit and determine the will of the voters. The discretion and authority were conferred upon the voters, and not upon the officers of the city."

In *Hansard v. Green*, 54 Wash. 161, 103 Pac. 40, 132 Am. St. 1107, 24 L. R. A. (N. S.) 1273, this court held that under this statute, in order to contract a valid bonded indebtedness for the purchase of water works, the whole plan or system, including the manner of payment therefor, must be submitted to the voters. Under the statute it is manifest that the same rule applies, and with equal force, when the debt is to be evidenced by warrants. See, also, *Thompson v. Sumner*, 9 Wash. 310, 37 Pac. 450; *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107.

The appellant contends that the act of 1901, which we have quoted, has no application, unless it be shown that the indebtedness of the municipality had reached the limit of one and one-half per centum of the taxable property therein, fixed by § 6, art. 8, of the state constitution. But the language of the statute which we have quoted makes it plain that the adoption of the plan or system by a majority vote is necessary even when no indebtedness is to be incurred therefor. This can only mean that no expenditure can be made for water works, whether the sum be within or without the constitutional limit, until the plan has been submitted to and adopted by the people. The statute makes it equally plain that no debt can be incurred for the purposes mentioned without the assent of three-fifths of the qualified voters of the municipality, though it does provide that the amount of the debt so created shall not exceed five per cent of the taxable property, and be additional to all other outstanding indebtedness of the municipality created within constitutional limits. This last mentioned provision, however, neither adds to nor diminishes the power conferred by the statute, since the constitutional provision would fix the outside limit of the

debt, no matter how authorized or for what purpose incurred. The case of *Hazeltine v. Blake*, 26 Wash. 231, 66 Pac. 394, cited by the appellant, does not touch the question here under discussion. The sole question there considered was whether the first constitutional limit of one and one-half per cent had been reached, and the court only held that certain indebtedness incurred by the assent of the voters should not be included in the computation of indebtedness in determining that question. There was no reference to, nor construction of, the statute here involved, nor does it appear that the plan or system of sewerage had not previously been adopted by vote.

There is nothing in the constitutional provision referred to which prohibits the legislature from requiring the assent of the voters to the creation of indebtedness, even within the first constitutional limit of one and one-half per cent of the taxable property. That constitutional provision has been held to be a limitation upon the power, and not a grant of the right to incur indebtedness. *Childs v. Anacortes*, 5 Wash. 452, 32 Pac. 217. It follows that the right of the legislature to grant the power to incur indebtedness for a specific purpose carries with it the right to prescribe how the power may be exercised for that specific purpose, provided it does not intrench upon the limitation as to amount fixed by the constitution.

The appellant also contends that the town, having received the benefit of the contract, should be estopped to deny liability thereon. After a careful examination of the authorities, we held, in the case of *Turner Inv. Co. v. Seattle*, *ante* p. 201, 126 Pac. 426, that there could be no estoppel to deny liability where there was an absolute want of power to make the contract, and that the municipality could only be estopped to raise the defense of *ultra vires* where the officers had acted within their powers but had exercised these powers in an illegal way. Were the question a new one, the writer of this opinion would incline to the view that the case before us should fall within the latter class, but the question is no

longer an open one. We are precluded from that view by the decision to the contrary in the *Pullman* case, where as we have seen, this court held, in reference to the same power here involved, that, "The discretion and authority were conferred upon the voters, and not upon the officers of the city." Touching the question of estoppel and ratification, it was there said:

"It is claimed, however, by the appellant, that, having received the benefits of the contract which the city entered into, it ought to be estopped from denying its validity; also that it had ratified the contract by receiving the benefits. It is well established that the power to ratify is coextensive only with the power to contract, and that an act which was illegal for want of authority on the part of the contracting powers cannot be ratified. There has been a conflict of opinion on some branches of this question, but an investigation of the authorities will show, we think, that where courts have estopped municipalities from interposing the plea of *ultra vires*, and from escaping the responsibility of their acts, it has been where there has been a defect in the execution of the contracts, as in the issuance of bonds, etc., and not where there has been an absolute want of power on the part of the municipality to contract."

See, also, *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601, and *State ex rel. Spring Water Co. v. Monroe*, 40 Wash. 545, 82 Pac. 888. In each of those cases this court held contrary to the appellant's contention here, and in the latter the *Pullman* case was cited and the above language was quoted with approval.

The appellant seeks to point a distinction in the fact that the leasing of the land here involved was not a part of any elaborate plan to establish a water system for the town; but a reading of the record convinces us that the springs were being acquired to be used at some time as a new source of water supply, and we find no authority in the statute for the adoption of a new source of supply except by the assent of the voters. We find no warrant for holding that the council may, by mere resolution, do piecemeal what it may

not so do as an entirety. If it could adopt and purchase or lease a source of supply without plan or submission, it could, with equal show of reason, carry out as separate acts in the same way each detail of a new water system, and the statute would be nugatory. Until the legislature has authorized such a course, the courts are not at liberty to say that such a course may be followed.

In view of our former decisions, we are constrained to hold that the lease here in question was void *ab initio*, and that the warrants issued in payment therefor are invalid, because both the making of the lease and the issuance of the warrants without the assent of the voters were *ultra vires* of the town council. Under the same decisions, the town is not estopped to assert that defense.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, MORRIS, and CROW, JJ., concur.

[No. 10573. *En Banc.* September 26, 1912.]

J. A. PAINE, *Appellant*, v. THE PORT OF SEATTLE *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—CREATION—PORT DISTRICTS—CONSTITUTIONAL LAW—INHERENT LEGISLATIVE POWERS. The port district act, Laws 1911, p. 412, authorizing the creation of port districts as municipal corporations, is not unconstitutional as creating municipal corporations not recognized by the constitution, there being no express constitutional prohibition against the creation of municipal corporations other than counties, cities, towns and school districts specifically named in the constitution, and the creation of municipal corporations being an inherent legislative power without express authority therefor; especially in view of the fact that the constitutional provisions respecting counties, cities, towns and school districts only regulate and do not expressly authorize their creation, and in view of Const. art. 8, § 6, referring to "other municipal corporations" than those specially mentioned.

[1]Reported in 126 Pac. 628; 127 Pac. 580.

SAME—CREATION OF PORT DISTRICTS—CONSTITUTIONALITY OF ACT—PARTIAL VALIDITY—ACTION—PLEADING—COMPLAINT. The port district act, Laws 1911, p. 412, authorizing the creation of port districts with power to make harbor improvements coincident or concurrent, to some extent, with the powers of counties and cities, is not void in its entirety from the mere fact that the port district may, in whole or in part, occupy the same territory as, and be superimposed upon another municipal corporation or corporations limited by the constitution in the amount of the expenditures that may be incurred for improvements of the same nature; and a complaint questioning the validity of a port district and its proposed indebtedness is insufficient where it does not appear that the indebtedness proposed would, with the existing indebtedness of the other municipality, exceed the constitutional limit.

APPEAL—BRIEFS—PRESENTATION OF QUESTIONS. Important and far-reaching constitutional questions are not sufficiently presented to call for a decision, when presented in a perfunctory manner within the compass of two pages of the brief, and without the citation of any authority; especially if moot questions, not controlling the real issues.

MUNICIPAL CORPORATIONS—CREATION OF PORT DISTRICT—ELECTION—VALIDITY—DESIGNATION OF POLLING PLACE—NOTICE. A port district election is not invalidated by the failure to show that county commissioners designated the polling places "by resolution," where it appears that the clerk of the board made arrangements for the polling places, the board allowed and paid rent therefor, and a fair expression of the wishes of the voters was not interfered with; nor by the fact that no notice of the polling places was given, when the statute did not require notice, and there was no claim of fraud or unfairness.

SAME—NOTICE OF REGISTRATION. Irregularity in a port district election in that in a few small towns no notice of opening the registration polls was given as required by Rem. & Bal. Code, § 4765, does not invalidate the election, where it appears that all but a few hundred voters in such town voted, and the vote carried by a majority of over nine thousand.

SAME—BALLOTS—FORM. A port district election is not invalidated by the failure of the ballots to conform strictly to the expressions prescribed by law, and the fact that they contained other matter, where the matter was explanatory and did not mislead, but rendered the question submitted clear and certain.

SAME—CANVASS OF RETURNS. A port district election is not invalidated by an irregularity in the canvassing of the votes, the canvass being made by the general election board instead of the county commissioners as required by the port district act, in the

absence of an allegation that the canvass made was incorrect and changed the result.

SAME—ELECTION—INDEBTEDNESS INCURRED—LIMITATIONS. An election to authorize the incurring of indebtedness by a port district is not invalidated in that the debt exceeded the statutory limit of two and one-half per cent of the assessed valuation of property within the district, where it appears that eight distinct propositions were voted on, and the aggregate indebtedness for all the propositions, exclusive of the last one, was within the limitation, and no other debt was contemplated or threatened; and the last proposition was separate from and additional to the others and contingent and expressly conditioned upon the event that, at some future time, the district should have the necessary legal authority and right to incur the indebtedness.

SAME—PUBLIC IMPROVEMENTS — SUBMISSION TO VOTERS — PLANS ADOPTED—SUFFICIENCY. Laws 1911, p. 423, § 9, requiring the port commission to adopt detailed plans and an estimate of the expense of the proposed improvement and submit the same to the voters, as a prerequisite to the incurring of indebtedness, is satisfied by the adoption of plans that fairly inform the voters of the nature and extent of the proposed improvement, and it is not essential that plans be adopted in such detail as necessary for the final construction of the improvement.

SAME—PUBLIC IMPROVEMENTS—SUBMISSION TO VOTERS — RESOLUTION—LEVY OF TAX. A resolution of a port district commission for the issuance and sale of bonds, providing that the net income shall be applied to the payment of principal and interest on the bonds from year to year, and a tax levied annually for support to pay the balance of the interest and bonds annually maturing, does not constitute the levy of a tax, but is nothing more than a pledge that the tax will be levied to make up any deficiency in the income.

SAME—PUBLIC IMPROVEMENTS—BONDS—INTEREST—SALE AT DISCOUNT. The port district act not providing the rate of interest that the commission may authorize on bonds sold, the commission will not be enjoined from selling at a discount bonds drawing four and one-half per cent interest, the limit specified in the resolution calling the election, where it is not alleged that the discount allowed will make usurious interest, the general powers of the commission clearly including the power to regulate the rate of interest, and there being nothing in the resolution respecting the rate at which the bonds should be sold.

APPEAL—REVIEW—AMENDMENTS PRESUMED. The supreme court may treat the complaint as amended and consider all questions that were deemed within the issues and determined on the merits in the lower court.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMIT—SUPERIMPOSED MUNICIPALITIES. The constitutional provision that no county, town, school district, or other municipal corporation shall become indebted to an amount exceeding a certain per centum of its taxable property, fixes a separate limitation for each corporation named which is not affected by the indebtedness of the different municipalities having jurisdiction over the territory on which it is superimposed, if the legislature did not abuse its power by providing for the creation of a municipal corporation for the sole purpose of avoiding the constitutional limitation of indebtedness.

SAME. A port district covering an entire county, is a municipal corporation having an independent existence with power to incur indebtedness on its own account up to the constitutional limitation, and its creation is not an abuse of the power of the legislature in that it was created to avoid the constitutional limitation of indebtedness of the municipal corporations upon whose territory it was superimposed, where they were created for entirely different purposes, and its chief object was to provide public terminal facilities for both sea and land commerce, although the municipalities upon which it was superimposed had somewhat similar powers respecting the acquisition of such facilities.

MUNICIPAL CORPORATIONS—PROPERTY—ACQUISITION—PRIVATE PURPOSES—LEASES—LOAN OF CREDIT. The borrowing of money for the purpose of acquiring sites for docks, wharves, and other public structures is a municipal purpose as well as a public purpose, and is not a loaning of municipal credit to an individual, within the meaning of the constitution, notwithstanding they were to be leased for a limited time to private persons; and the private uses of the lessee would not affect the validity of the bonds issued to acquire or construct them, if they were not acquired or constructed for the sole purpose of leasing, and the power was reserved to regulate wharfage charges.

MUNICIPAL CORPORATIONS—INDEBTEDNESS AND BONDS—POWERS—RESTRICTIONS—STATUTES—CONSTRUCTION. Laws 1911, p. 418, § 4, empowering a port district to acquire or construct systems of sea walls, jetties, wharves, docks, ferries, canals, locks, tidal basins and other rail and water transfer and terminal facilities, and to issue local improvement bonds to pay for the same, contains a seeming inconsistency in also providing that no bonds shall ever be issued for the acquiring of any "dock or wharf" until such dock or wharf has been leased upon terms which will produce a net income sufficient to pay the bonds at maturity and the interest thereon, in view of the requirement in § 6 of the preliminary adoption of a comprehensive plan or scheme of the entire system; and such limitation as to docks and wharves can have no application, where a comprehensive scheme has been adopted, as required by § 6, in which there is no

possibility of separating the earnings of the dock or wharf from the earnings of the other facilities making up the entire system; and hence it must be construed to apply only where a dock or wharf is acquired separately or together without the other facilities.

MUNICIPAL CORPORATIONS—IMPROVEMENTS — PORT DISTRICTS — INDEBTEDNESS—SUBMISSION—PROCEEDINGS. The submission of the question of incurring indebtedness by a port district under Laws 1911, p. 418, §4, is authorized after the adoption of the "comprehensive scheme" provided for in § 6, and prior to the adoption of the "detail plans" provided for in § 9.

Appeal from a judgment of the superior court for King county, Myers, J., entered July 16, 1912, upon sustaining a demurrer to the complaint, dismissing an action for an injunction. Affirmed.

Ballinger, Battle, Hulbert & Shorts, for appellant.

Preston & Thorgrimson, for respondents.

PARKER, J.—This action was commenced in the superior court for King county, by the plaintiff, a taxpayer, seeking an injunction restraining the issuance and sale of certain bonds of the port district of Seattle, which the commissioners of that district propose to issue and sell to procure funds with which to purchase property and construct improvements for the district. The defendants demurred to the plaintiff's complaint upon the ground that the facts stated therein do not constitute a cause of action. The demurrer was sustained by the court, and the plaintiff electing to stand upon his complaint and not plead further, a judgment of dismissal was thereupon rendered against him, from which he has appealed to this court. The numerous contentions made by counsel for appellant have to do with the constitutionality of the law authorizing the establishment of port districts; the validity of the election held to create the port district of Seattle; the validity of the election held to authorize the incurring of the debts and issuing of the bonds here involved; and the validity of certain acts and proceedings of the port commissioners looking to the issuance

and sale of certain of the bonds in pursuance of the result of the election. We will notice the several questions relating to these subjects in this order, and will refer to the facts alleged in the complaint, so far as may become necessary in our discussion of each of the questions separately. The law here involved is the port district act, found in the Laws of 1911 at page 412. Its general scope or purpose is fairly stated in its title as follows:

"An act authorizing the establishment of port districts, providing for the acquirement, construction, maintenance, operation, development and regulation of a system of harbor improvements and rail and water transfer and terminal facilities within such districts, and providing the method of payment therefor."

This law authorizes the creation of port districts as municipal corporations with defined powers to be exercised by a board of three commissioners.

It is contended by counsel for appellant that this law is unconstitutional and for that reason void, because it provides for the creation of a municipal corporation not recognized by the state constitution. Our attention is called to certain provisions of the constitution wherein counties, cities, towns and school districts are specifically named and recognized as municipal or public corporations, and also to the fact that no others are specifically named in the constitution. It is argued that this in effect is an implied prohibition against the creation of other municipal corporations. No constitutional provision has come to our notice, and we feel quite sure there is none, which in terms prohibits the legislature from providing for the creation of other municipal corporations than those specifically named in the constitution. Indeed, it is apparent from a reading of the several provisions of the constitution wherein we find counties, cities, towns and school districts specifically named, that those provisions were adopted for the purpose of prescribing the duties of the legislature in making provisions for the

organization of such corporations and not for the purpose of conferring upon the legislature the power to provide for their creation. The language of the constitution, in so far as it relates to these specifically named corporations, clearly manifests an assumption on the part of the framers of that document that the legislature has the inherent power to provide for the creation of those specifically named corporations without any express power in the constitution. For instance, in § 4, article 11, we read:

"The legislature shall establish a system of county government, which shall be uniform throughout the state, . . . "

And in § 10, article 11, it is provided:

"Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, . . "

We find no constitutional provision referring to creation of school districts as municipal corporations, other than the possible inference to be drawn from the language of § 2, article 9, providing:

"The legislature shall provide for a general and uniform system of public schools."

These constitutional provisions, which come as near being specific expressions of legislative power to create municipal corporations as can be found in the constitution, it seems to us were clearly intended to be nothing more than declarations of mandatory duty placed upon the legislature to exercise, and exercise in a prescribed manner, certain inherent powers which it was assumed that the legislature possessed without any grant of power in the constitution other than such general grant of legislative power as necessarily follows from the mere fact of the creation of a legislative department of government, or from the expressed grant of general legislative power found in § 1, article 2, of the constitution as follows:

"The legislative powers shall be vested in a senate and house of representatives, which shall be called the legislature of the state of Washington."

Not only has the constitution failed to grant in specific terms power to the legislature to provide for the creation of these named corporations and thereby possibly inferentially prohibit the creation of others, and also failed to prohibit the creation of others by any express declaration, but by language clear and certain has raised a strong inference that there may be other municipal corporations created in pursuance of legislative enactment. In § 6, article 8, we read:

"No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, . . ."

The words "other municipal corporations" as here used evidently have reference to others than the ones specifically named, and it will be noticed this provision names counties, cities, towns and school districts. It is elementary constitutional law that the legislature of a state may enact any law not expressly or inferentially prohibited by the constitution of the state or nation. This doctrine is clearly stated in Cooley's Constitutional Limitations (7th ed.), p. 241, as follows:

"In every sovereign state there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power rests in the Parliament; in the American States it resides in the people themselves as an organized body politic. But the people, by creating the constitution of the United States, have delegated this power as to certain subjects, and under certain restrictions, to the Congress of

the Union; and that portion they cannot resume, except as it may be done through amendment of the national constitution. For the exercise of the legislative power, subject to this limitation, they create, by their state constitution, a legislative department upon which they confer it; and granting it in general terms, they must be understood to grant the whole legislative power which they possessed, except so far as at the same time they saw fit to impose restrictions. While, therefore, the Parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American States possess the same power, except, *first*, as it may have been limited by the constitution of the United States; and, *second*, as it may have been limited by the constitution of the state."

That the enactment of laws providing for the creation of municipal and public corporations is within this inherent legislative power we think is not subject to serious dispute. *Straw v. Harris*, 54 Ore. 424, 103 Pac. 777; *In re Madera Irrigation District*, 92 Cal. 296, 28 Pac. 272, 675, 27 Am. St. 106, 14 L. R. A. 755; *Cook v. Port of Portland*, 20 Ore. 580, 27 Pac. 263, 13 L. R. A. 533; *Wilson v. Board of Trustees of Sanitary District*, 133 Ill. 443, 27 N. E. 203; 28 Cyc. 135, 139. We are of the opinion that the legislature has ample power under our constitution to enact laws providing for the creation of municipal corporations other than counties, cities and towns and school districts, and that this law is not unconstitutional because of such want of general power.

It is contended by counsel for appellant that "The Port District Act is unconstitutional and void in that it authorizes, by the subterfuge of superimposing a new municipal corporation upon an existing municipal corporation, the creation of indebtedness upon the same territory, for the same purpose, in excess of the constitutional limitation of municipal indebtedness prescribed in § 6, article 8 of the constitution." This contention is rested entirely upon the following allegations of the complaint:

"That the corporate limits of said port district are co-extensive with the corporate limits of King county; that the entire area within the corporate limits of the city of Seattle is embraced within the corporate limits of said port district; that the entire area within the corporate limits of School District No. 1, a municipal corporation, which are co-extensive with the corporate limits of the city of Seattle, is embraced within the limits of said port district, and that the entire area of one hundred sixty-seven (167) other school districts, all municipal corporations, and the entire area within the incorporated limits of the incorporated cities and towns mentioned the corporate limits of said port district; that said port district act pretends to vest said port district with the authority to incur indebtedness for some, or all, of the purposes for which one or more of the other aforesaid municipal corporations may incur indebtedness; that those parts of said port district act which authorize said port district to incur indebtedness are unconstitutional and void in this; that they vest in said port district, as aforesaid, the authority to increase the indebtedness charged upon territory affected beyond the limits of indebtedness imposed upon municipal corporations by section 6 of article 8 of the state constitution, and that by reason of said parts of said act being unconstitutional, said act is unconstitutional in its entirety, and all proceedings had and proposed to be had by said commission and said port district should be declared illegal and void."

Nothing could be plainer than that these allegations do not present a question of actual threatened violation of the debt limit prescribed by § 6, article 8, of the state constitution above quoted. All of these facts may be true, and yet the combined debt of all of the municipal corporations mentioned as being superimposed one upon the other may not, when added to the debt proposed to be incurred by the port district, exceed in amount the constitutional debt limit, computed as if all these municipal corporations were one. Manifestly then we are not here called upon to decide a concrete case of threatened violation of the constitutional debt limit. The only inquiries presented by this contention are these: (1) Does the mere fact that the law by its terms

authorizes the creation of port districts with some of the powers possessed by municipal corporations occupying the same territory, or a portion thereof, render the law unconstitutional in its entirety? (2) Does the mere fact that the law authorizes a port district to incur indebtedness which, if added to the debt of other municipal corporations exercising some of the same powers and occupying the same territory, may exceed the amount of the constitutional debt limit prescribed for a single municipal corporation, render the law unconstitutional in its entirety, or the issuance of the bonds here involved beyond the power of the port district?

Counsel call our attention to the fact that counties and cities already possess, to some extent at least, the same powers for making harbor improvements and incurring indebtedness therefor as this law in terms confers upon port districts; and also to the fact that the debt proposed to be incurred by the port district is at least in part for the construction of improvements which are within the power of both King county and the city of Seattle to construct at public expense. Counsel then proceed to argue that the constitutional debt limit applicable to the port district must be measured by the combined debt of the municipal corporations, at least that of the city, county and port district occupying the same territory; and from their conclusion argue that the law is unconstitutional in its entirety because it thus renders possible the violation of the constitutional debt limit. In their last analysis these contentions amount to nothing more than this: Because a port district may not be able to exercise to the full extent the debt incurring power in terms conferred upon it by this law, the law is unconstitutional in its entirety, and the port district is without legal existence. This is all that is left of the argument; because, as we have seen, in no event do the facts pleaded show a violation of the constitutional debt limit, even if we were to assume that the debt of all these municipal corporations must be measured as if they were one.

Counsel cite in support of their contention: *Orvis v. Board of Park Com'rs of Des Moines*, 88 Iowa 674, 56 N. W. 294, 45 Am. St. 252; and *Reynolds v. City of Waterville*, 92 Me. 292, 42 Atl. 553, which come as near supporting their position as any authority to which our attention has been called. But there was not involved in either of those cases the question of the power of the legislature to authorize the creation of municipal corporations in the same territory occupied by others having to some extent similar powers; but rather the mere power of one of the agencies of a municipal corporation to create a debt of the corporation as though such agency were a distinct corporation. These cases were both decided upon the theory that there was no separate municipal corporation; and in the Iowa case it seems to be inferred that, had the legislature clearly provided that the board of park commissioners should be a municipal corporation separate from the city, the question would be different from the one they were called upon to decide.

Some reliance is also placed upon our decision in *State ex rel. Zylstra v. Clausen*, 66 Wash. 324, 119 Pac. 797. That case presented the question of the measure of the constitutional debt limit, where one school district was superimposed upon the territory of another, to some extent, by consolidation and reorganization. In that case there actually resulted an exceeding of the debt limit when the debt of the old and new district were added together. We have no such concrete case here presented, as we have noticed; and besides, in that case, one municipal corporation was superimposed upon another of exactly the same nature. Such does not appear to be the case here. To just what extent a newly formed corporation which is superimposed upon another, territorially, must differ from it in powers and purposes, in order that the debts of the two may be regarded separately for the purpose of measuring their constitutional debt limit, we are not here called upon to decide. Though it seems that the general powers and purposes of a port dis-

trict, as compared with the general powers of a county or city, are sufficiently different to make it a municipal corporation of quite a different character than either a county or city. We conclude that the law is not unconstitutional because by its terms it gives to a port district some of the powers and authorizes it to make expenditures and incur indebtedness for some of the things for which a county and city may make expenditures and incur indebtedness. We think the facts pleaded do not call for our decision upon any other question than this, in so far as counsel are relying upon the provisions of the constitution limiting the debt which municipal corporations may incur.

Counsel for appellant contend that the law is unconstitutional in that it authorizes the port district to give its money and loan its credit in aid of private parties; in that the law confers upon the port district the power of eminent domain to acquire private property for that purpose; in that the law authorizes the incurring of indebtedness for other than strictly municipal purposes; and in that the law authorizes the port district to create local improvement districts to pay for improvements by local assessments, when none of the improvements it is authorized to make would in fact be local improvements such as in law would support local assessments to pay therefor. These important and far-reaching questions are all presented by assertions made practically without argument and without the citation of a single authority, within the compass of two pages in appellant's brief. It is probably enough for us to say that we do not regard such a perfunctory presentation of questions of such great moment as requiring an expression of our opinion thereon. Besides, if we did assume to decide them, our decision would be nothing but an expression of opinion upon moot questions, not controlling any of the real issues presented by the facts pleaded in this case. It is manifest that, notwithstanding the port district of Seattle may be authorized by this law to loan its credit to some extent in aid of private parties;

notwithstanding the law may in terms give to the port district the power of eminent domain beyond that which it can constitutionally exercise; notwithstanding the port district may, to some extent, under the terms of this law, incur indebtedness for purposes not strictly municipal; and notwithstanding the port district may not possess any constitutional power of local assessment whatever which the law in terms grants; still the port district could have a legal existence and could incur the indebtedness it now proposes to incur without the validity of that indebtedness being affected by any of these questions, so far as appears from the facts alleged in this complaint. We must decline to regard any of these questions as being properly before us in this case.

It is alleged that, in the election held to create the port district, the county commissioners "did not, by either resolution or motion of record, designate polling places, as required by law." It is admitted, however, that the county auditor made arrangements for such polling places in each voting precinct, and that the county commissioners thereafter audited and ordered paid the rent for such polling places. The port district act is silent as to how the polling places shall be designated. Section 4798, Rem. & Bal. Code, is relied upon by counsel for appellant as showing the legal necessity for the county commissioners designating polling places by recorded resolution or motion, where it is provided that they "shall designate one voting place in each precinct." Assuming that this section applies to an election of this nature, it will be noticed that it is not alleged that the commissioners did not designate the polling places, but only that they did not do so by recorded resolution or motion. The statute is silent on this question. In view of the fact that the auditor, the clerk of the board of county commissioners, made arrangements for the polling places, and that they thereafter allowed and ordered paid the rent for such polling places, we must presume that he acted by their

authority and that they approved his acts in that regard. It is not claimed that the polling places were designated in any unfair manner, or that their place of designation in the least interfered with a fair expression of the wishes of the voters at the election. We think this did not avoid the election.

It is alleged that no notice of the polling places in the several voting precincts was given for the election to establish the port district, and that the election was thereby rendered illegal. Our attention has not been called to any statutory provision requiring any such notice. We have noticed that there is no claim of fraud or unfairness in the location of the voting precincts, and manifestly want of notice of their locations would not avoid the election when the claimed duty of election officers is not rested upon some statutory requirement.

It is alleged that in some of the smaller cities and towns of the port district no notice was given of the opening of the registration poll books during the year in which the election for the establishment of the port district was held, and that such failure of notice rendered the election void. Our attention is called to § 4765, Rem. & Bal. Code, requiring city and town clerks to publish such notice. Even if we should assume that this requirement is anything more than directory, it, in any event, would not affect the result, for it is plain from the facts alleged in the complaint that all but a total of a few hundred of the voters in all such cities and towns voted at the election, and that the establishment of the port district was carried by a majority of over 9,000 votes. Clearly this irregularity could in no event have affected the result, and therefore did not affect the validity of the election.

The port district act provides:

"In submitting the said question to the voters for their approval or rejection, the proposition shall be expressed on said ballot in the following terms: . . . 'Port of.....

Yes;' 'Port of .....No' (giving the name of the principal seaport city within such proposed port district, or if there be more than one city of the same class within such district, such name as may be determined by the board of county commissioners.)"

It is alleged that in the printed form of the ballot used in the election for the creation of the district the question was submitted in this form:

"Special County Election.
"King County, State of Washington,
"Tuesday, Sept. A. D. 1911.
"Instructions to Voters.

"Place a cross (X) in the square [] after word 'yes' if you desire to vote for 'Port of Seattle.' Place a cross (X) in the [] after word 'no' if you desire to vote against 'Port of Seattle.'

" 'Shall a port district be created in King county for the acquirement, construction, maintenance, operation, development and regulation of a system of harbor improvements and rail and water transfer and terminal facilities to be known as the 'Port of Seattle,' under the provisions of Chapter 92, Session Laws of Washington, 1911?'

"Port of Seattle .....'Yes' []
"Port of Seattle .....'No' []"

It is contended that this form of submission of the question was in violation of the statute. It is argued that the ballot was rendered void by the fact that it contained matter other than the mere words "Port of Seattle.....'Yes' "; "Port of Seattle.....'No.' " The act does not prohibit putting any other matter or words on the ballot, and it seems clear that any such matter which does not mislead, but renders the question submitted clear and certain as this does, will not render the election void. We conclude that the ballot fairly and legally stated the question to be voted upon.

The port district act provides:

"If at such election a majority of the voters voting upon such proposition shall vote in favor of the formation of such

district, the board of county commissioners shall also declare in its canvass of its returns of such elections, and such port district shall then be and become a municipal corporation." Laws 1911, p. 414, § 3.

This, it is contended, makes the county commissioners a canvassing board to canvass the returns of the election. There is no other provision in the act upon that subject. It is alleged that the commissioners did not canvass the returns; but that they were canvassed by the chairman of the commissioners, county auditor, and prosecuting attorney. These officers constitute the regular county canvassing board as provided by the general law. Rem. & Bal. Code, § 4932. No claim is made that the vote cast at the election for the establishment of the district was different from that found by the canvassing board as thus constituted, which was 13,799 votes in favor of, and 4,539 votes against, the establishing of the district. Appellant not having challenged the fact that the district was established by a majority vote of the voters voting upon that question, he is not in position to claim that the port district has no legal existence because of an irregularity in the canvassing of the votes. The result of the election established the district and not the declaration of that result by the canvassers. What we have said relative to the election for the creation of the district applies equally to objections made to the validity of the election held to authorize the incurring of the indebtedness here involved, each of the indebtedness propositions there submitted having been carried by a much larger majority.

The questions discussed and decided in the case of *Murphy v. Spokane*, 64 Wash. 681, 117 Pac. 476, and authorities there cited, support our conclusion upon the qnestions here raised touching the regularity and validity of these elections. At pages 686, Justice Morris, speaking for the court, said:

"The principle underlying all these decisions is that the rights of the voters should not be prejudiced by the errors or wrongful acts of the election officers, unless it be made to appear that a fair election was prevented by reason of the alleged irregularities."

It is contended that the debt limit of 2½ per cent of the assessed value of the taxable property of the district, that being the debt limit prescribed by § 4 of the port district law, will be exceeded by the incurring of this proposed debt, and that, therefore, all of it is unauthorized and cannot be lawfully incurred. If the incurring of the entire indebtedness had been submitted to the electors as one proposition and it had all been authorized by the voters unqualifiedly, there would be ground for this contention. It appears, however, by the allegations of the complaint, that there were eight separate and distinct propositions submitted to the voters at the election, each of which was voted upon separately, and each of which was carried by a majority of 16,000 or more. These propositions were numbered from one to eight. Proposition one submitted to the voters for ratification or rejection a comprehensive scheme of harbor improvements, consisting of six independent improvements or "units" as they were termed. This first proposition did not involve the question of incurring indebtedness. Propositions 2 to 7, inclusive, submitted to the voters for ratification or rejection, separate and distinct from each other, the questions of incurring indebtedness to construct the following unit improvements.

(2)	Smith's Cove improvement	$1,000,000
(3)	East Waterway improvement	850,000
(4)	Salmon Bay improvement	350,000
(5)	Central Water Front improvement	750,000
(6)	Lake Washington improvement	150,000
(7)	Harbor Island improvement	3,000,000
	The total of these being	$6,100,000

The total 2½ per cent statutory debt limit, computed upon the assessed valuation of the property within the district, is $6,466,000. So it is plain that the total of the several debts authorized to be incurred to construct these improvements will be within the statutory debt limit. The construction of these improvements is authorized by the election without qualification, and it is contemplated that they all be constructed in the immediate future as soon as practicable. It is also plain that each is to be constructed and thereafter operated entirely independent of the others. Proposition No. 8 was also submitted separately. This authorizes the construction of what is termed "Harbor Island supplemental improvement." The general nature and the qualified manner of the authorization of this improvement is fairly expressed in the language of the proposition as printed upon the ballots as follows:

"Upon the proposition of authorizing the port commission of the port of Seattle to incur indebtedness and issue bonds in the sum of $2,000,000 (over and above the indebtedness and bond issues described as propositions two, three, four, five, six and seven, in the resolution of February 7th, 1912, hereinafter referred to) . . . , the said indebtedness herein authorized to be actually incurred and bonds therefor to be actually issued only as and when construction of said additional piers shall be required to accommodate shipping traffic, and then only when the said port commission, acting in behalf of said port of Seattle, shall, at the time of creating said indebtedness and the issuance of bonds therefor, have the necessary legal authority and right to do so."

It is manifest that the adoption of this proposition was intended to in no way affect the validity of any of the other debt propositions, and that if the total of all the seven debt propositions should result in exceeding the statutory debt limit this one only was to fail. It is plainly an authorization of a debt over and above that of all of the others. It is as much a separate debt authorization, and has as little influence on the others so far as the statutory debt limit is con-

cerned, as if it had been adopted at a separate and later election. We are not here concerned with the question of this proposition exceeding the statutory debt limit, for no claim is made that the port commissioners are contemplating the exercise of any power by virtue of the adoption of this proposition by the voters. Indeed, it is plainly to be inferred from the facts alleged that there will be no occasion to attempt the exercise of any power under the authorization of this proposition for some time in the future. We are of the opinion that there is not at the present time any threat on the part of the port commissioners to incur indebtedness in excess of the statutory debt limit, in view of the fact that they are not proposing to incur any indebtedness other than that which was authorized by the adoption of propositions 2 to 7 inclusive, and proposition 8 being adopted entirely separate from the others, does not render the others void as being in excess of the debt limit. This view is not in conflict with our decision in *Blaine v. Seattle*, 62 Wash. 445, 114 Pac. 164, relied upon by counsel for appellant, these debt propositions being submitted to the electors separately, and the ultimate consummation of one improvement not being dependent on any of the others.

It is contended by counsel for appellant that the commissioners of the port district have failed to adopt plans for the proposed improvement as a prerequisite to the incurring of the debts here involved, as required by § 9 of the port district act. It is there provided:

"Before ordering or aiding any improvement, the cost of which, in excess of fifty per cent, is to be borne by the entire port district, the port commission shall adopt the detail plans, declare the estimated cost thereof, the annual expenditures to be made thereon and if such annual expenditures shall exceed one-half mill of the port district tax levy allowed by this act, based on the assessment valuation for the current year the port commissioner shall and by resolution submit to the electors of the port district at a general or special election, the proposition to so expend the general

funds or issue the general bonds of the district." Laws of 1911, p. 423, § 9.

It might well be argued that this indebtedness was not authorized under the provisions of this section, but under the provisions of § 4 of the act which requires the authorization by a larger majority. But assuming that the plan requirement of § 9 is controlling here, we are informed by the allegations of the complaint that plans were adopted for each of the unit improvements prior to the submission of the indebtedness questions to the electors. It is alleged in the complaint that such plans were adopted by the commissioners:

"Giving the description of the land and the location upon the land of the docks, wharves, and other improvements to be constructed, and giving the respective sizes, shapes and contours of each of said buildings and improvements, and the nature of the material of which the same is to be constructed, and also making an estimate as to the cost of each of said improvements, but said plans fall short of being the detail plans required by the statute, in that neither specifications nor working plans have been prepared by said port commission in sufficient detail to properly call for bids."

This is all of the information the complaint gives us as to the nature and extent of the plans adopted; and while it contains a general allegation that the plans were not such "detail plans required by the statute," it is not pointed out in what respect they were deficient. The allegations as to their nature and extent seem to indicate that they were sufficient, and with no other facts before us, we will assume that they were. We do not think it was necessary that the plans and specifications to be adopted at that time should be such complete detailed plans and specifications as would be necessary to have for the final construction of the improvement. We think the statute is satisfied when the adopted plans are such as to fairly inform the voters of the general nature and extent of the proposed improvement. We are of the opinion that the alleged facts show the adoption of such plans as

satisfies the requirement of § 9, even assuming that that section is controlling here.

The original resolution providing for the holding of an election upon the several indebtedness propositions provided as to each as follows:

"Said bonds, principal and interest, to be payable out of the net income from said improvement, and in case said net income shall not be sufficient for that purpose the remainder shall be payable out of taxes levied upon the property in said port district, and the details of the method of creating and applying said net income and taxes and of creating a proper and sufficient sinking fund for the payment of the principal of said bonds to be as hereafter prescribed by said commission."

It is contended that the commissioners by their resolutions providing for the issuance and sale of the bonds evidencing the indebtedness for the several units, they having adopted a separate resolution as to each unit, have exceeded their authority, in that they have, in effect, by such resolutions, authorized the levy of an annual tax to aid in paying the indebtedness, before there is in fact any deficiency in the income from the improvements to pay the indebtedness. This contention is rested upon the following provisions contained in each resolution adopted by the commissioners for the issuance and sale of the bonds.

"The net income from said improvement shall be paid into the fund hereinafter created, and shall be applied to the payment of the principal and interest of said bonds, and no portion of said net income shall be diverted to any other purpose. There shall be levied in the year 1912 by the port of Seattle, upon all property in said port district subject to taxation, a tax sufficient to pay the interest upon all of said bonds payable during the year 1913, and the principal of all of said bonds maturing during the year 1913, and in the year 1913, and in each year thereafter so long as any of said bonds shall remain unpaid, there shall be levied by said port of Seattle, upon all of the property in said port district subject to taxation, a tax in an amount which together with the net income of said improvement available for such purpose

shall be sufficient to pay the principal of all of said bonds then outstanding which mature in the next following year and the interest of all of said bonds payable during the next following year."

It seems to us that these provisions do not constitute the levy of a tax, but are nothing more than a pledge to the bondholders that a tax will be levied from year to year sufficient to make up any deficiency in the income from the improvements to pay the interest and principal upon the bonds from time to time as they mature. It is true that for the year 1913 the resolution seems to unqualifiedly provide for the levy of a tax to pay the interest. It is apparent, however, that the commissioners concluded that in no event would there be any income from the improvements, because of their being in the course of construction, prior to the falling due of the interest for that year; but however that may be, if there should be any income prior to that time it would not necessarily follow that a levy for the interest then falling due would be made beyond that which would be sufficient to pay the deficiency. We do not think that these resolutions mean more than this. We conclude that the commissioners have not exceeded their authority in thus making provision for the issuance of the bonds and the levy of a tax to pay the same as may become necessary from year to year.

It is provided in the resolution calling the election upon the several indebtedness propositions that the bonds to be issued in pursuance thereof should bear interest not to exceed the rate of 4½ per cent per annum. It is alleged in the complaint that the commissioners have called for bids for the sale of a part of the bonds, and that they threatened to sell the same below par in the event a better price cannot be received. This, it is contended, amounts to a threat upon the part of the commissioners to dispose of the bonds at such a price that will in effect amount to having them bear a greater rate of interest than 4½ per cent. No facts are alleged, however, warranting us in concluding that the commission-

ers are threatening to so dispose of the bonds as to have the effect of pledging the district to pay usurious interest thereon. The port district act makes no provision for the rate of interest the bonds shall bear, nor does it contain any provision requiring the bonds to be disposed of in any particular manner or at any particular price. The general powers of the commissioners of the port district seem to be clearly sufficient to authorize them to fix the rate of interest, providing it does not exceed usurious interest, nor is there anything in the port district act requiring that this question be submitted to the electors. In the late case of *Kierman v. Portland* (Ore.), 122 Pac. 764, the court said:

"The weight of authority is to the effect that the sale of municipal bonds below par is not illegal, unless the act or ordinance authorizing the issue expressly directs that they shall not be sold for less than par. 'That the bonds of a municipal corporation may be sold by it for less than par must be regarded as a general understanding of lawmakers of the states, as well as the officers of the municipalities, because, when it is desired to prevent such sale, that fact is incorporated in the enabling act or in the ordinance or resolution providing for the issue of the bonds.' Simonton on Munic. Bonds, § 146. See, also, *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014; *City of Lynchburg v. Slaughter*, 75 Va. 57; *City of Memphis v. Bethel* (Tenn.), 17 S. W. 191; *City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960."

Assuming that the rate of interest stated in the original resolution upon which the election was held is binding upon the commissioners, so far as the form of the bond is concerned, we think it in any event goes no further than this, since there was nothing therein relating to the price at which the bonds should be disposed of and there is nothing in the port district law to that effect. Therefore, the alleged threat of the commissioners to dispose of the bonds at less than par we think does not warrant our interference. If the allegations of the complaint were such as to render it plain that the commissioners were proposing to dispose of the bonds in such manner that the district might in effect be pledged to

pay usurious interest thereon, there would be a more serious question for our consideration, but the allegations of the complaint do not warrant our assuming such a state of facts. Our decision in *Parkinson v. Seattle School District No. 1*, 28 Wash. 335, 68 Pac. 875, is in harmony with this view, in so far as there is involved the power of the commissioners to fix the rate of interest the bonds shall bear without the submission of that question to the electors.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and CROW, JJ., concur.

MORRIS, J. (concurring)—I am not in full accord with all that is said in the opinion. Inasmuch, however, as, under my understanding of the issue involved, the only question to be determined is the constitutionality of the act and the sufficiency of the election, and the language to which exception might be taken does not go to either of these questions, but rather to others in my judgment not now properly before us, and seeing no constitutional objection to the act, nor finding any objection to the election which should disturb the result, I therefore concur in the result.

ELLIS and CHADWICK, JJ., concur with MORRIS, J.

ON PETITION FOR MODIFICATION.

[*En Banc.* November 12, 1912.]

FULLERTON, J.—Since the filing of the opinion in this cause, the parties thereto have asked the court either for an expression of its views on certain of the objections to the validity of the bond issue discussed at the argument, but thought by us not to be involved in the case as presented, or to indicate more fully in what particular we deem the record incomplete, so that the same may be so far perfected as to make it properly present these objections. The showing accompanying the requests have convinced us that some, at least, of these objections, if well founded, require a different

judgment from that directed in the former opinion, as they challenge both the power of the corporation to raise the revenues necessary for its corporate existence, and its power to expend such revenues when collected for the purposes it is proposed to expend them. It appears, also, that the trial court deemed these objections as properly within the scope of the issues, as made by the allegations of the complaint and the demurrer thereto, and determined them upon their merits. We have concluded, therefore, that, in view of our liberal statutes relating to consideration of causes on appeal, we may treat the complaint as amended, and review all questions which were deemed within the issues in the court below and determined by that court.

Passing then to the first of these objections, it will be remembered that the port of Seattle, as incorporated, compromises all of the territory embraced within the boundaries of the county of King; that within these boundaries are numerous school districts, several cities and towns incorporated as such, and of course the municipal corporation of the county of King; that all of these incorporations have certain municipal powers, among which is the power to incur indebtedness for carrying out the purposes of their organizations up to a certain per centum of the assessed valuation of the taxable property within their boundaries; that the corporate powers of the port of Seattle are somewhat similar to the powers possessed by certain of these municipalities, particularly the city of Seattle and the county of King; and that the port of Seattle, if it issues the bonds the issuance of which this action is sought to enjoin, will thereby incur an indebtedness which, if added to the indebtedness of the municipalities above specifically named, will exceed the indebtedness permitted by the state constitution for "strictly county, city, town, school district, or other municipal purposes." The inquiry, therefore, is, has this corporation an independent debt limitation under the state constitution, or is its indebtedness confined to that portion of the limitation fixed by the constitution not

taken up by the indebtedness of the municipalities over whose territory it is superimposed.

In *State ex rel. Zylstra v. Clausen*, 66 Wash. 324, 119 Pac. 797, we held that the territory of a school district chargeable with an indebtedness for school purposes could not be chargeable with a further indebtedness which, added to the first, exceeded the constitutional limitation, although the territory had been incorporated into a consolidated district and the further indebtedness was an indebtedness proposed to be created by the consolidated district. This case is cited as controlling the question at bar, but we think it without application. Since the constitution provides that no county, city, town, school district, or other municipal corporation shall become indebted to an amount exceeding a certain per centum of its taxable property, it has seemed to us that it would be a gross perversion of this limitation to allow any such entity, by the simple process of disincorporating and reincorporating, to increase indefinitely the burden of its indebtedness for the prohibited purpose, and for that reason that the principal of the case is sound. But it seems to us equally plain that it was the purpose and intent of the constitution that one of these incorporations could be superimposed upon the territory of the other; that is to say, that a city or town could be superimposed upon the territory of a county, that a school district could be superimposed upon the territory of a county and city or town, and that another municipal corporation, or perhaps more than one, could be superimposed upon the territory of a county, a city or town, and a school district. As to the corporations specifically named, there is no question that each has its own limit of indebtedness under the constitution, notwithstanding the imposition of such indebtedness may increase the gross indebtedness chargeable to the particular territory to a sum equal of each of the limitations taken separately. Now the "other municipal corporation" named in the constitution stands on the same plane as these especially enumerated. The language is that "No

county, city, town, school district, or other municipal corporation shall for any purpose become indebted," to an amount exceeding a certain limitation; and clearly such corporation, when properly and legally organized possesses the same powers as those previously named. This leads to the inevitable conclusion that it has its own limitation of indebtedness and is not affected by the indebtedness of the different municipalities having jurisdiction over the territory on which it is superimposed.

The argument that the legislature, if it is permitted to provide for the organization of municipal corporations other than those specially enumerated in the constitution, may so far abuse the power as to provide for the creation of municipal corporations for the sole purpose of avoiding the limitation of indebtedness enjoined by the constitution, has no weight as applied to the corporation here under consideration. It is plain that this one is not so organized. It has no connection with either the city or county government and has a purpose independent of each of them. The chief purpose of a city or county is civil government, although much latitude may be given them in aid of the execution of their purposes. The object of this incorporation is to provide public terminal facilities for both sea and land commerce, or perhaps better, to provide a place open to the entire public where sea and land traffic may meet for the purposes of exchange. This being its object, we think it may be deemed a municipal corporation having an independent existence, and having power to incur an indebtedness on its own account up to the limitations fixed by the constitution, and the statute authorizing its incorporation.

Section 4 of the port district act authorizes a port district to lease the terminal property to be acquired by it for a term not exceeding thirty years. It is asserted in the brief of the appellant that the respondents contemplate leasing the area known in the record as the Harbor Island improvement

for a thirty-year term, and a part of the east waterway improvement for a term of ten years, and challenges the constitutionality of the statute and the legality of the bonds on the ground that such a transaction on the part of a municipal corporation is to give its money and property and loan its money and credit to a company or corporation in violation of the prohibition contained in § 7, of article 8, of the state constitution; and further, that to borrow money with which to acquire property for the purposes of leasing the same is not a municipal purpose, but a private purpose because of the interpolation of the private interest of such lessee. It has seemed to us that this contention might be dismissed with the statement that the borrowing of money for the purpose of acquiring sites for docks, wharves, and other public structures is clearly a municipal purpose as well as a public purpose, and any suggestion as to the use which may or might be made of such properties after their acquisition would not affect the validity of the bonds issued to raise the money for their acquisition or construction. The real issue being whether the leasing is legal or illegal, the issue can best be determined when it is sought to prevent such a lease being entered into or to avoid it after its consummation. The respondent has however admitted on the record that its purposes in this regard are correctly stated by the appellant, and in view of this it is thought proper to say that the mere fact that the statute permits a leasing for limited periods of property so municipally acquired and owned, is not legally objectionable. Perhaps if the sole purpose of acquiring the property was to lease it to an individual or corporation for private use, its acquisition and lease would be in violation of the constitutional provision cited. But when the purpose is to establish public wharves or docks, and the lease is for a limited time, with power reserved to regulate wharfage charges, as it is in this instance, it cannot be said to be the acquisition of the property for a private purpose nor the giving of money or property or the loaning of the credit of

the municipality to an individual or corporation or within the meaning of this section of the constitution. *In re Mayor etc.*, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. 825.

Section 4 of the port district act also empowers the district after its due organization "to lay out, construct, condemn, purchase, acquire, add to, maintain, conduct and operate any and all systems of sea walls, jetties, wharves, docks, ferries, canals, locks, tidal basins and other harbor improvements, rail and water transfer and terminal facilities within such port district." It also empowers the district to issue local improvement bonds and provide for their payment by local improvement assessments, and to borrow money and issue bonds in an amount not exceeding two and one-half per centum of the taxable value of all property in such port district, upon three-fifths majority vote of the qualified voters in such district. It then provides that no bonds shall ever be issued to provide for the acquiring of any "dock or wharf" until such commission shall have first negotiated a lease of such "dock or wharf" for a time of not less than ten years upon terms which will produce a net income sufficient to pay the interest on the bond issue as such interest accrues, and create a sinking fund which at a proportionate rate will retire the bonds at maturity, or, if operated directly as a public wharf, the port shall have fixed a schedule of wharfage rates which will produce a sufficient revenue for that purpose. By § 6 of the act, it is made the duty of the port commission provided for in the act, before creating any improvements thereunder, "to adopt a comprehensive scheme of harbor improvements," which after a public hearing and notice shall be submitted for ratification or rejection by the people. The port commission in this instance adopted the "comprehensive scheme" required, which included practically all of the facilities enumerated in the paragraph from § 4 of the act which we have quoted. They also pledged the net revenues of all of the facilities included within the scheme adopted to the payment of the interest and principal on the bonds proposed

to be issued for the acquisition of such facilities. The appellant makes the point that this action on the part of the port commission does not meet the requirement of latter part of § 4 relating to the acquisition and construction of "docks and wharves." We confess to a difficulty in arriving at the meaning of this part of the section. Read by itself, it seems sufficiently clear; but when studied in connection with the remainder of the act, it is utterly incongruous, and if given its literal meaning would destroy the act, owing to the impossibility of carrying its terms into effect. As we have said, the act requires the adoption of a comprehensive scheme of improvements before any action is taken for their acquisition and construction. This scheme must necessarily include, and in the scheme here adopted does include, many facilities in addition to the dock and wharf, and creates the greater part of the proposed expenditure. If this part of the act means, therefore, that the dock or wharf must be dealt with as separate entities, as something apart from the remaining facilities provided for in the comprehensive scheme, then there is no means of carrying the act into effect, as the different facilities making up the entire scheme are so closely related that there is no possibility of separating the earnings of the dock and wharf from the earnings of the other facilities. On the other hand, if the terms "dock and wharf" were intended to embrace all of the facilities provided for the comprehensive scheme, and requires all such facilities to be leased for a sufficient sum to meet the interest upon the bonds as it accrues and retire the same at maturity, then the clause is inconsistent with other provisions of the section which provide for the issuance of local improvement bonds and their payment by local assessments, and other sections of the act which provide for the levying of general taxes by the port district and the retirement of the bonds from the funds so acquired. Seemingly the clause can be given effect only in case the port should acquire a wharf or dock either together or singly, without the acquisition of any of the other enumerated facili-

ties. We conclude, therefore, that, if this clause of the statute has meaning at all, it refers only to those cases where the port acquires a dock or wharf either separately or together, without the acquisition of any additional facilities; and since the bonds in question here are issued in accordance with the other provisions of the act, their validity is not affected whether they are secured or unsecured by a pledge of the net income of a lease of the facilities to be acquired.

In our former opinion, when discussing the question whether the bond issue was invalid because the port commission had failed to adopt "detail plans" for the improvement before submitting the indebtedness question to the electors, we fell into the error of assuming that such plans had been adopted prior to such submission; whereas in fact they had not been so adopted. Certain other plans had seemingly been adopted, but not the "detail plans" provided for in § 9 of the act. But, as we intimated in the opinion, these proceedings were had under § 4 of the act, which unquestionably allows the question of indebtedness to be submitted after the adoption of the "comprehensive scheme" provided for in § 6, and prior to the adoption of the "detail plans" provided for in § 9. We cannot therefore think that the failure to adopt these plans prior to the submission of the indebtedness question to the electors in any way affects the validity of such indebtedness.

The judgment is affirmed.

MOUNT, C. J., PARKER, ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9908. Department One. September 28, 1912.]

H. F. PROVINE, *Respondent*, v. THE CITY OF SEATTLE *et al.*, *Appellants*.[1]

APPEAL—DECISION—LAW OF CASE. A decision on a former appeal that the facts made a case for the jury, becomes the law of the case, and is conclusive on a second appeal, taken after a reversal and remanding the case for judgment upon the verdict.

Appeal from a judgment of the superior court for King county, Gay, J., entered June 12, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages to property by reason of the regrade of a street. Affirmed.

James A. Snoddy and *Walter B. Beals*, for appellants Hawley & Lane.

John P. Hartman, for respondent.

PER CURIAM.—This action was commenced by H. F. Provine against the city of Seattle and H. W. Hawley and L. C. Lane, copartners as Hawley & Lane, to recover damages resulting from defendants' wrongful acts in placing earth against plaintiff's building, causing it to move or slide from its foundation and to be partially destroyed. Plaintiff claimed damages in the sum of $2,892.15 for injuries to the building, and for loss of profits from his business which was necessarily suspended. The jury returned a verdict for $1,692.15. Thereafter the defendants interposed separate motions for a new trial, and for judgment notwithstanding the verdict. The trial judge, without passing on the motion for a new trial, entered judgment notwithstanding the verdict, and dismissed the action. Thereupon plaintiff appealed, and this court, in *Provine v. Seattle*, 59 Wash. 681, 110 Pac. 619, reversed the judgment, and remanded the cause

[1]Reported in 126 Pac. 927.

with instructions to overrule the motion for judgment notwithstanding the verdict, and for further proceedings. After remittitur, the motion for a new trial was overruled, and judgment was entered in plaintiff's favor upon the verdict of the jury. The defendants have now appealed.

A statement of the case may be found in our former opinion, and need not be here repeated. Appellants contend that excessive damages were awarded, that the evidence was insufficient to sustain the verdict, and that the trial judge erred in instructions given and refused. The important question is whether defendants deposited earth north of and against respondent's building, in excess of the amount which they were entitled to deposit, and if they did, whether the excessive quantity of earth so deposited was the proximate cause of damages which respondent sustained. On the former appeal we held the cause was for the jury, and that error had been committed in sustaining the motion for judgment notwithstanding the verdict. That ruling became the law of the case, which upon this appeal disposes of appellants' contention that the evidence was not sufficient to sustain a verdict in respondent's favor.

As to the contention that the damages awarded are excessive, it may be stated that they are well within the allegations of the complaint and evidence admitted. Appellants attack certain items claimed by respondent, insisting that they were not proper items of damage; that they should not have been allowed; that they were allowed by the jury; and that the verdict was therefore excessive. The record shows that, while to some extent the trial was waged upon the question of the amount of the damages, the principal contest was on the issue whether the earth was wrongfully deposited against the building, or whether it had been placed there at respondent's instance and request. At the time of the trial, appellants made but little if any attack on the particular items of damage to which they now direct our atten-

tion. In any event, we find the evidence sufficient to sustain the verdict for the full amount awarded.

Appellants now complain of instructions given and refused. The issues were simple. The entire body of the instructions state the law, are free from prejudicial error, cover all requested instructions which should have been given, and could not have misled the jury. The evidence now before us is the same evidence which we considered on the former appeal. It sustains the verdict, and the record is free from prejudicial error. The motion for a new trial was properly denied.

The judgment is affirmed.

[No. 10219. Department One. September 28, 1912.]

CHARLES SMITH, *Appellant*, v. QUINAULT LUMBER COMPANY, *Respondent*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE. In an action for personal injuries sustained by an employee in a mill when a slasher saw exploded, the plaintiff is shown to be guilty of contributory negligence precluding any recovery, where it appears that the saw was in good condition, that he fed the saw a slab in a slanting position, contrary to orders, knowing that it was liable to break the saw and thinking he would take the chance.

Appeal from a judgment of the superior court for Pacific county, Sol Smith, J., entered July 11, 1911, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for personal injuries sustained by an employee through the breaking of a saw. Affirmed.

Chas. E. Miller, for appellant.

Welsh & Welsh, for respondent.

CROW, J.—Action by Charles Smith against Quinault Lumber Company, a corporation, to recover damages for

[1]Reported in 126 Pac. 641.

personal injuries. The trial judge sustained the defendant's motion for a directed verdict, and dismissed the action. The plaintiff has appealed.

The only question presented is whether there was sufficient evidence to submit to the jury. Appellant, who was employed as offbearer in respondent's sawmill, worked upon a table behind an edger, where his duties consisted in pushing slabs and lumber upon slasher chains which conveyed them to slasher saws to be cut into required lengths. There were nine slasher saws. While appellant was engaged in this work, one of the saws exploded, and he was injured by a flying piece of the saw, which struck his arm. He contended that the saw was old, cracked, unsafe, and unfit for use; that it was not properly guarded, and that respondent, knowing these defects, did not furnish him a safe place in which to work. The trial judge directed a verdict and dismissed the action, for the reason that appellant failed to produce evidence of any defect in the saw, or of any negligence on respondent's part, and for the further reason that appellant's negligence was the proximate cause of the accident. Appellant contended that the saw had not been changed for fourteen days; that it was dull; that it was not cutting the slabs, and that he so informed respondent's foreman.

Undisputed evidence of experienced mill men and saw filers, some of them appellant's witnesses, was that the saw must have exploded; that saws would not explode unless slabs were passed to them upon the chains in an angling position; that to have slabs meet saws in that manner would cause them to strain, buckle, and explode; and that the saw which injured plaintiff did explode. The saw of which appellant complained was, by stipulation of the parties, introduced in evidence as an exhibit, and was examined by experienced mill men and saw filers who testified that it had exploded; that its condition disclosed the fact to be that, immediately prior to its explosion, it was in good repair; that its teeth were

sharp; that it had not been cracked; that had it been cracked it would not have exploded, but would have continued revolving upon its rim. Undisputed evidence further shows that it was appellant's duty to direct the slabs and see that they were placed on the chains in such a manner as would cause them to meet the saws at right angles; that he knew this to be his duty; that he knew the slabs, if permitted to meet the saws in an angling position, would cause them to explode; that he was provided with a pole and hook with which to guide them, and also with a rope by which he could control and instantaneously stop the chains. Appellant testified as follows:

"The slab that caused the saw to break was about 2 x 5 on one end and 2 x 4 on the other and from six to ten feet long. I had just cleared off the table and thrown all the bark down on the chains and just immediately before that there was a great large slab went through the saw. The one that caused the saw to break did not go through straight, but went through slanting. I could have stopped the chains and straightened it either by getting down on the chains or by using a long pole with a hook on the end of it which the defendant had provided me with which to straighten the slabs, but I did not think the slab was large enough to break the saw and I thought I would take the chance. Mr. Olson, the defendant's foreman, told me to be more careful and not to run the slabs through slanting for two reasons, first, that they would break the saw if run through slanting, and, second, he wanted them run through straight because he was using the slabs for lath material and they must be cut straight."

This evidence without dispute shows that appellant was negligent, and that his negligence was the proximate cause of the accident.

The judgment is affirmed.

CHADWICK and PARKER, JJ., concur.

[No. 10666. Department One. September 28, 1912.]

T. G. COOPER, *Respondent*, v. W. J. HINDLEY *et al.*, *Appellants*.[1]

APPEAL—SUPERSEDEAS — WHEN GRANTED — BOND INSUFFICIENT—STATUTES. Rem. & Bal. Code, § 1722, authorizing a stay of proceedings on appeal, upon the giving of a bond conditioned to pay all damages suffered by the delay, has no application to an appeal from a judgment in mandamus directing city commissioners to call an election upon amendments to the city charter proposed by the electors, since there can be no damages to measure and no liability on the supersedeas bond.

APPEAL—SUPERSEDEAS—BY SUPREME COURT. The supreme court will not grant a supersedeas on appeal from a judgment in mandamus directing the submission of amendments to a city charter where it would unreasonably delay the taking of a popular vote; since it is a matter involving popular right in which the writ of *audita querela* would not issue.

Motion filed in the supreme court August 29, 1912, for a supersedeas. Denied.

H. M. Stephens, for appellants.

Morrill, Chester & Skuse, for respondent.

CHADWICK, J.—Under the initiative power reserved in the freeholders' charter, certain electors of the city of Spokane filed a petition with the city clerk, praying and requesting that certain proposed amendments to the city charter be submitted to the people. It is alleged that, notwithstanding the charter imposes a mandatory duty upon the commissioners of the city to call an election within thirty days after filing the petition, for the purpose of submitting the proposed amendments to the whole electorate of the city, the commissioners, the defendants, have wholly neglected, failed, and refused to call such election or to give any effect whatever to such petition. The refusal of the commissioners

[1]Reported in 126 Pac. 916.

being manifest, plaintiff brought a proceeding in mandamus to compel the commissioners to order and give notice of such election. Defendants answered, justifying their refusal and setting up their belief that, under the constitution and laws of the state of Washington, they had no right or authority to act upon the petition, or to call a special election, or to refer the matter to the people at any election other than at a general municipal election, which will not occur until the first Monday in November, 1913. The matter coming on before the superior court of Spokane county, it was ordered that a peremptory writ of mandamus issue. Whereupon defendants gave notice of appeal and filed a bond, conditioned both as a bond on appeal and as a supersedeas. The record is incomplete but, from the argument and briefs, we take it that the court below has refused to treat the bond as a stay bond. At any rate, the parties defendant are here asking us to fix a supersedeas to save them from the penalties of a threatened contempt proceeding, pending a hearing upon the merits.

It is the contention of the defendants that they have a right of appeal, and that their remedy is wholly by appeal. We are not disposed to question this right, nor are we willing to hold that defendants cannot review the judgment of the lower court by writ of certiorari. They say that a right of appeal being secure, the right to supersede the judgment follows as an incident under the statute governing appeals in civil cases. Rem. & Bal. Code, § 1722. Defendants rely upon: *State ex rel. Nooksack River Boom Co. v. Superior Court*, 2 Wash. 9, 25 Pac. 1007; *State v. Sachs*, 3 Wash. 96, 27 Pac. 1075; *State ex rel. German-American etc. Sav. Bank v. Superior Court*, 12 Wash. 677, 42 Pac. 123; *State ex rel. Denham v. Superior Court*, 28 Wash. 590, 68 Pac. 1051; *State ex rel. Norris Safe & Lock Co. v. Superior Court*, 30 Wash. 177, 70 Pac. 256; *Packenham v. Reed*, 37 Wash. 258, 79 Pac. 786; *State ex rel. Holcomb v. Yakey*, 48 Wash. 419, 93 Pac. 928; *Boothe v. Summit Coal Min. Co.*,

59 Wash. 610, 110 Pac. 536; *State ex rel. Puget Sound Elec. R. v. Mitchell*, 60 Wash. 660, 111 Pac. 873. These cases, except 60 Washington, which really rested upon a special statute, are in keeping with the holding of the court in *State ex rel. Nooksack River Boom Co. v. Superior Court*, 2 Wash. 9, 25 Pac. 1007, where it is said:

"Therefore, inasmuch as the peremptory writ in this case, in so far as it had any legal effect, commanded the relator to do an act which it seeks by appeal to relieve itself from doing, and the doing or not doing of which is the kernel of the whole controversy, it is proper that, under sufficient security that it will obey the judgment and writ if the final determination of the cause on appeal be against it, it should have had the amount of such a security fixed, and upon the filing of its bond all proceedings looking to the enforcement of the writ should have been stayed."

On the part of the plaintiff it is said that to grant a supersedeas in a case of this character would be a vain and useless thing; that it would not operate to protect plaintiff and those concerned with him, for there can be no damages to measure, or right of person or of property to protect; that its only office would be to delay a popular right, already delayed since May, 1912, until November, 1913; and in support of these contentions the case of *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609, is cited; and also, *State ex rel. Lambert v. Superior Court*, 59 Wash. 670, 110 Pac. 622. In the first case a question of public or popular right was involved, and a supersedeas was denied both by the trial court and by this court. In view of the seeming conflict between this case and those cited by defendants, it is a matter of regret that the reasoning of the court was not made a matter of record in the *Boyd* case. It stands only as a naked authority in plaintiff's favor. In the *Lambert* case a supersedeas was denied by the trial court, and the original case was brought here by a writ of certiorari. This case, while in no sense binding upon this court, nevertheless voices the opinion of a learned trial judge that a supersedeas

should not be granted in a case of popular right. Although this court has said with frequent affirmation that a supersedeas will be allowed in all cases, it is recorded that it has been twice denied by a superior court and once by this court in cases like unto this. This seeming conflict impels counsel for defendants to insist that, if a supersedeas be not now allowed, we will be compelled to overrule all of our former decisions save the case of *Hindman v. Boyd*. If, casually considered, it would seem to be so; but a review of the cases relied on, and a careful consideration of the question in the light of the present appeal, impels us to hold that the cases are not in conflict, and that a proper decision was rendered in each of them.

Our practice of superseding judgments is in substitution of the common law writ *audita querela*. 37 Cyc. 597. This writ was issued in an independent proceeding in the nature of an equitable suit, brought for relief against an unjust judgment, and the parties were required to plead to the issue. 1 Bacon's Abridgment, Title, Audita Querela; *Brooks v. Hunt*, 17 Johns. 484; *Lovejoy v. Webber*, 10 Mass. 101. Such procedure not only tended to delay the law, but often resulted in the loss of the fruits of a judgment lawfully obtained. Hence, the use of the writ became obsolete upon the framing of statutes giving a right to stay a judgment upon condition that a bond be given to secure its payment or performance. From the very nature of the statute, it is implied that the loss or damage suffered by the delay may be met by a money award. Unless the loss can be so met, a stay is not ordinarily granted. Hence, a supersedeas is never allowed to stay a self-executing judgment. *State ex rel. Martin v. Poindexter*, 43 Wash. 147, 86 Pac. 176; *State ex rel. Holcomb v. Yakey*, 48 Wash. 419, 93 Pac. 928.

Now, in the case at bar, there is no party in interest who could claim a damage, for there is no measure. Nor could there be a recovery, for there can be no loss. The proffered bond is a mere formality. The stay, if allowed, could be

ordered without it, under the general equity powers of the court. The party in interest is the public, represented by plaintiff and his fellow petitioners, and defendants are the officers and servants of the people. To admit defendants' contention that a supersedeas follows an appeal in all cases and of whatever nature, we must hold that a supersedeas follows as a matter of right. This would be inconsistent with what we conceive to be the intent and spirit of the statute, as well as many decisions heretofore pronounced by this court. In *State ex rel. Gibson v. Superior Court*, 39 Wash. 115, 80 Pac. 1108, 109 Am. St. 862, 1 L. R. A. (N. S.) 554, the right to supersede a judgment was carefully considered in the light of the authorities, and the court noticed the distinctions existing before the adoption of statutes allowing a supersedeas, and held that a stay could not be had as a matter of right. This case was followed in *State ex rel. Burrows v. Superior Court*, 43 Wash. 225, 86 Pac. 632, where is is said: "It is discretionary whether such courts shall suspend a doubtful decree pending appeal." In *Lund v. Idaho & Washington Northern R. Co.*, 48 Wash. 453, 93 Pac. 1071, the general equity power of the court to suspend or to refuse to suspend its decrees pending an appeal is reaffirmed. In that case the court said: "Such a supersedeas, however, should not be granted if it will result in preventing the respondents from ultimately securing equitable relief to which they will be entitled in the event of an affirmance of the judgment."

In *Campbell Lumber Co. v. Deep River Logging Co.*, 68 Wash. 431, 123 Pac. 596, after declaring the discretionary power of the court, a supersedeas was granted upon the ground "that justice and the peculiar equities of the situation" demanded it. It goes without saying that, had the statute been accepted as mandatory in all cases, this court as well as trial courts, should not have denied a stay on the one hand or granted a supersedeas having reference to the peculiar equities of the situation on the other. The statute,

Rem. & Bal. Code, § 1722, does not apply, therefore, unless the justice and equities of the case can be met and measured by the condition of the bond therein prescribed; or, in other words, in cases where an *audita querela* would have issued at common law to protect private right or property. We, therefore, find no basis upon which to rest a right to supersede the judgment in this case. In a case involving a public question or a popular right alleged to be secured by statute or charter of a self-governing city, we have no hesitation in saying that, if it appear probable that the granting of a supersedeas would unreasonably delay the determination of a right to take a popular vote upon a public question, the case is within the spirit if not the letter of the cases just cited.

Having found that we have a discretion in the instant case, it would appear that the case might be rested upon a deeper principle than the one heretofore discussed. There can be no good government unless the people are satisfied. Without contentment the social compact cannot endure. No government has ever remained free unless the right of petition has been kept inviolate. The right of petition was an ancient right under the common law of England. It was recognized in 13 Car. II, Stat. 1, chap. 5; and confirmed in 1 W. & M. Stat. 2, chap. 2. The colonies, no doubt, would have been willing to remain attached to the throne of England had not their right of petition been denied. The fact that those in authority refused to hear our pleas was the supreme cause of our Revolution. That denied, there was added to positive wrongs and oppressions the bitterness of resentment, which has been in all times the essence of revolution against the tyrant. In the charter of our liberties—the Declaration of Independence—the wrongs of the colonies are recapitulated, and it is said: "In every stage of these oppressions, we have petitioned for redress in the most humble terms. Our repeated petitions have been answered only by repeated injury." So thoroughly was the right of petition impressed upon the American people as a right inviolate that it is written in

the constitution of the United States and is to be found in the constitution of this and of every other state. A petition, when secured as in this case by a positive provision providing for the manner of its exercise, should not be postponed in its hearing, unless controlling statutes of the constitution of a state makes delay imperative. The people are sovereign, and their voice, when properly asserted, is the supreme law of the land; and until negatived upon a popular vote, the petition of a number equal to the percentage fixed by law must stand in this court and all others as the present declaration of popular desire. So, in this case, it seems that, if the right to stay the judgment of the lower court is inconsistent with, or might tend to delay for an unreasonable time the expression of a popular will, the court should, in aid of that justice which is common to all, deny a petition which, if allowed, would have the force and effect of an injunction, pending a hearing the time of which is uncertain. It does not require technical or legal reasoning to find the principle to which we have adverted. It is as apparent to the layman as to the lawyer. When the governing body of Spokane sought to defeat the right of the citizens to frame its present freeholders' charter (the *Lambert* case) and to change its form of government, and was ordered by the mandate of the superior court to call an election that the people might act, the leading newspaper in the eastern part of the state, in recognition of the right of the people to be heard, applauded the act of the trial judge, and although not mentioning in terms the right of petition, affirmed the principle, saying:

"Judge Sullivan's statements at the time of issuing the writ of mandate ordering the city council to call a special election for the choosing of 15 men to revise the city charter are so simple and axiomatic as to surprise the ordinary man that the city council should have made an appeal to the courts necessary. To carry the case to the supreme court will only result in delay and expense in an attempt to defeat both the spirit and the purpose of the law. 'The court is here to enforce the laws as they are written,' said the judge. 'The

law says the council shall call an election upon the filing of the petition. There are no "ifs" and "ands" about it.' In this case a petition was filed which contained several hundred more signatures than the law requires for the calling of such an election, yet the city council refused to recognize its sufficiency. After this refusal the council did pass a resolution to hold an election nearly a year later. This was clearly a greater delay than could be justified. . . . Had the councilmen obeyed the law as promptly as Judge Sullivan is enforcing it, all of this confusing litigation would have been avoided."—Spokesman-Review, July 24, 1910.

This quotation is not cited as authority, for our holding does not depend upon authority. It is quoted merely as an illustration of the fact that the fundamental principles underlying free government are above the law as it is written in statutes, and are known and understood of all men. It may be that, upon the merits of this case, defendants can show legal and sufficient cause for refusing to obey the mandate of the court. But the question being one of public right, we must refuse to stay the arm of the law, for it is our judgment that the statute relied on, Rem. & Bal. Code, § 1722, was not ordained to cover such cases.

On the face of the proceeding, as we now have it before us, the plaintiff and those who are similarly situated have complied with the charter provision allowing a certain number of the citizens of Spokane to call for an election to pass upon charter amendments, and defendants will not be heard upon an application for a supersedeas to delay or defeat that right. Their objections call for a construction of the charter of the city as well as the constitution and general law of the state; and if valid, can only be heard when this case comes on for hearing on the merits or by a writ of certiorari. Of the merits of the case we express no opinion.

Motion denied.

GOSE, ELLIS, PARKER, and CROW, JJ., concur.

[No. 10291. Department One. September 30, 1912.]

OTIS ELEVATOR COMPANY, *Appellant*, v. BERTHA B. JOHNSON, *Respondent*.[1]

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal, especially where the evidence as brought up contains references to exhibits that are unintelligible.

SALES—WARRANTY—BREACH. A valid excuse for failure to repair a machine sold, to make it conform to warranty, is not shown by the fact that the seller objected to an attempt to repair it at a time most inconvenient, and no other attempt to repair was made.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered December 17, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Parker & Richards, for appellant.

H. J. Snively and *I. J. Bounds*, for respondent.

ELLIS, J.—The plaintiff brought this action to recover a balance unpaid upon the purchase price of an elevator which it had contracted to install for the defendant in a building known as the Hotel Yakima, at North Yakima. The making of the contract was admitted. It was in writing, and provided that the plaintiff would, for the sum of $1,250, furnish and install a hydraulic ram passenger elevator, complete, to be made of first class materials and installed in a good and workmanlike manner, within sixty days after receipt of the "approved layout," the elevator when completely installed to have a lifting capacity of fifteen hundred pounds. The plaintiff, by the terms of the contract, was to do all of the work and furnish all materials, except that the defendant should prepare the hatchway and the supply and discharge piping and make connection with the valve of the elevator. It was admitted that the elevator was received in North

[1]Reported in 126 Pac. 894.

Yakima and installed in May, 1906, and that the defendant has paid $300 on the purchase price but refuses to pay the balance. The defense was that the plaintiff represented and verbally warranted that the elevator would operate successfully and economically under the conditions in North Yakima, and with the water pressure which could be there secured; that the defendant knew nothing about elevators or under what conditions they would operate, and relied wholly upon these representations in making the purchase; that the elevator was erected and installed in a careless, negligent, and unworkmanlike manner; that the materials and machinery were defective, and that the water pressure which can be obtained in North Yakima is not sufficient to operate the elevator efficiently. The defendant asked damages in the sum of $2,200, which she claimed to have suffered by reason of the failure to properly install the elevator and the failure of the elevator to perform the service for which it was intended. The cause was tried to the court without a jury. After a full hearing upon the evidence, the court found that there was a failure of performance of the contract upon the plaintiff's part; that the elevator as installed was defective; that the piston leaked and was misshapen at the joint, so that in passing through the packing at the top of the cylinder it was retarded, causing a jerking motion; that the piston leaked and filled with water, requiring extra pressure and causing water to squirt therefrom upon the floors of the building; that these were substantial defects and existed at the time when the action was commenced.

The court further found that a new piston was put in after this action was commenced. But there was no finding that the elevator could be successfully operated therewith, even after the new piston was substituted. The court further found that, because of the failure of the plaintiff to substantially perform its contract and the defendant's payment of $300 upon the contract, the defendant was damaged in the sum of $300, and, after overruling the plaintiff's motion for

a new trial, rendered judgment against the plaintiff for that amount and costs. The plaintiff has appealed.

It is obvious that, if these findings were sustained by the evidence, the judgment cannot be disturbed. We have examined the record with much care and are satisfied that, so far as it is intelligible to us, the evidence sustains the findings. Much of the evidence as it appears in the statement of facts is wholly unintelligible. The witnesses testified by referring to a blue print of the plans of the elevator, saying "here" and "there," "this" and "that," and indicating what was intended upon the plan. For example, one witness was asked to explain the operation of the cylinder and piston. He answered:

"Well, in operating the machine you simply—when the machine is standing there isn't any pressure on there at all. When you start up the cylinder you open this valve (indicating) and the water comes in here, comes in around this cylinder (indicating), right around in here (indicating). You can see the lines there between the cylinder and the piston (indicating). The water comes right around in here and the pressure around this and at the bottom (indicating)—wouldn't make any difference whether this is square or sharp (indicating)—but the pressure around there forces that piston up to this point up (indicating), shoves the car up to the top floor."

And again, another witness was asked by the court what caused the jerky motion in the movement of the elevator. After stating that the cylinder and ways were not in line, he explained:

"Yes, I can show you on that drawing. See, here are two guides that guide the elevator (indicating). This is all in the center line. Now, taking it up here, you see, here is the center line through there (indicating), now then, we will say this, for instance, that cylinder lay in that position, it would cause it. It would have to give here in the gland, you understand (indicating). The cylinder instead of standing, as shown on this center line here (indicating), if the cylinder stood a little this way, but not in line with the side guides, that these ways, as it went up, this (indicating)

would keep crowding it over this way all the time and it would make it bind in this gland here (indicating)."

All this, and much more evidence of the same kind, was doubtless lucid and instructive to the trial court, but is manifestly of no assistance to us as it appears in the typewritten record. A great deal of the evidence was in sharp conflict, and the trial court was in much better position, in view of the character of the record, to understand and weigh this conflicting evidence than we are.

It is claimed that the defects in the piston might have developed from misuse of the elevator by respondent. We are satisfied, however, that the evidence wholly failed to establish this, and that it sufficiently appears that the elevator was not properly constructed and installed in the first instance.

It is urged that the appellant was prevented from putting the elevator in good working order by the refusal of the respondent to permit the work. The evidence, however, fails to establish this. She permitted several efforts to repair, and the evidence merely shows that, when other offers were made, the respondent objected because they were at times most inconvenient to her, and the appellant made no further effort until after this suit was commenced and almost two years after the elevator was installed. Moreover, there was no sufficient evidence that, even after the substitution of the piston was made, the elevator would perform the work for which it was intended in a satisfactory manner. Even on this point the evidence was conflicting.

Upon the record before us, we cannot say that the findings of the trial court were not sustained by a preponderance of the evidence.

The judgment is affirmed.

Mount, C. J., Morris, Parker, and Fullerton, JJ., concur.

[No. 10732. Department One. September 30, 1912.]

THE STATE OF WASHINGTON, *on the Relation of L. R. Quillen, Clerk of the Town of Winlock, Plaintiff*, v. THE SUPERIOR COURT FOR LEWIS COUNTY *et al., Respondents.*[1]

INTOXICATING LIQUORS—LOCAL OPTION ELECTION—PETITION. Rem. & Bal. Code, § 6294, requiring a petition for a local option election to designate the name of the precinct in which the petitioners reside, their post office address and their street and house number, if any, is substantially complied with by giving the name of the town as their post office address, without specifying any precinct, street or house number, where there was only one voting precinct in the town, and the houses were not numbered.

Certiorari to review a judgment of the superior court for Lewis county, Rice, J., entered September 23, 1912, enjoining the publication of notice of a local option election. Reversed.

W. A. Reynolds, for plaintiff.

Thacker & Hancock, for respondents.

CROW, J.—On August 31, 1912, a petition, signed by one hundred qualified electors of the town of Winlock, Lewis county, was filed with the clerk of that municipality. The petition, including the first signature, reads as follows:

"Petition for a Municipal Local Option Election.

"To the Honorable Clerk of the Town of Winlock, County of Lewis, State of Washington:

"We, the undersigned, qualified electors of the town of Winlock, county of Lewis, state of Washington, do hereby respectfully petition and request you to order, give notice of and prepare for the submission of the question whether the sale of intoxicating liquor shall be licensed and permitted within the said town of Winlock, to the qualified electors thereof, at the next general county election to be held in

[1]Reported in 126 Pac. 899.

said town of Winlock, to wit, on the fifth day of November, 1912.

"This petition is signed and filed, and this request made in accordance with and under and by the authority of the provisions of chapter 81, of the 1909 session laws of the state of Washington, approved by the governor, March 12th, 1909.

"Name	Post office Address	Ward—Precinct & House No. if any	Date of Signing.
"Sarah Sweeny	Winlock, Wn.		Aug. 13, 1912."

All other signatures were appended in the same manner. On September 10, 1912, W. H. Crouse, an elector of Winlock, commenced an action in the superior court of Lewis county against L. R. Quillen, clerk of the town of Winlock, to restrain him from publishing notice of the election. The defect in the petition upon which the plaintiff relied as grounds for an injunction was alleged as follows:

"That the said petition so filed with said clerk of the town of Winlock, Lewis county, Washington, is void, illegal, and of no effect in the respects and for the reasons following, to wit: . . . That none of the signers of said petition stated their precinct within which they resided in connection with their signature, and that none of said signers of said petition have named the street and the house number, if any, in connection with their signature thereon where the said signer of said petition resided at the date upon which said elector signed said petition."

The town clerk for an affirmative defense alleged, that the town of Winlock is a municipal corporation of the fourth class, in Lewis county, state of Washington; that but one voting precinct or polling place is included within the corporate limits; that it is not divided into wards or voting precincts; that no system has been adopted for numbering the houses and residences within the corporation, and that the houses therein are not numbered. The trial court found that the petition was subscribed by qualified electors of the unit equal in number to more than thirty per cent of the electors voting at the last general election; that it designated the town of Winlock in Lewis county, Washington, as the place in

which the election is to be held; that it designated the date of the election; that it stated the question to be submitted; that all the persons signing the petition stated their post office address and the date of their signatures; that none of them stated the name of the precinct in which they reside; that none of them stated the name of the street or the house number of their residences; that no system has been adopted for numbering the houses and residences within the town; that they are not numbered; that the town of Winlock has not been subdivided into wards and precincts; and that there is but one voting place within the town. Upon these findings, a final decree was entered, by which the clerk was enjoined and restrained from publishing, or causing to be published, any notice of the election. To review this decree the defendant has applied to this court for a writ of certiorari, and the cause is now before us for final consideration.

The only theory on which the petition was held invalid was that the electors all failed to write opposite their signatures the name of the precincts in which they reside, or the street and house numbers of their respective residences. Section 3 of chapter 81, page 153, Laws 1901 (Rem. & Bal. Code, § 6294), relative to petitions for local option elections, provides that:

"Such petition shall designate the unit in which the election is desired to be had, the date upon which the election is desired to be held, and the question that is desired to be submitted. The persons signing such a petition shall state their postoffice address, the name of the precinct in which they reside, and in case the subscriber be a resident of a city, the street and house number, if any, of his residence, and the date of signature. Said petition shall be filed not less than sixty days nor more than ninety days prior to the date upon which the election is desired to be held. No signature shall be valid unless the above requirements are complied with, and unless the date of signing the same is less than ninety days preceding the date of filing."

It is manifest that the purpose and intention of this statute was to require each petitioner to give such information rela-

tive to his place of residence, including his precinct and street number, as would enable interested parties to readily ascertain whether he was in fact an elector residing within the unit in which the election was to be called. All municipal corporations mentioned in § 1 of the local option act (Rem. & Bal. Code, § 6292), are units. We take judicial notice of the fact that many of the larger municipalities of this state are subdivided into precincts for voting purposes. Where such conditions exist, a statement of the precinct in which the electors reside is a necessary aid to any one who may desire to ascertain whether the signer is in fact a qualified elector of the unit; and in any unit having several precincts, the failure of the petitioners to state the particular precinct in which they reside might prove fatal to the petition. In this case the petition in its body specifically states that the subscribers are all qualified electors of the town of Winlock. It is conceded that but one voting place exists within the municipality, and that it constitutes but one precinct. Each signer, after his or her signature, stated his or her post office address to be "Winlock, Washington." A repetition of the word "Winlock" as the particular precinct in which he or she resided would give no additional information, nor would it lend any further assistance to any person who might desire to check up the petition and learn whether the signers were qualified electors as stated. When the petitioners stated in the body of the petition that they were electors of the town of Winlock, they in effect stated that the precinct in which they resided, there being only one precinct. It seems to us that in this instance the petition gives all needful, practical or actual information required by the statute, or that could be given by a most technical compliance with the statute. The manifest purpose of the statute has been fully met. No one has been or can be misled or hindered while making an examination of the petition. The highly technical construction for which the plaintiff below contends would in effect annul rather than enforce the statute. In view of the con-

ceded fact that Winlock has but one polling place, that it is not subdivided into two or more precincts, and that the houses are not numbered as in larger cities, we hold the petition sufficient.

The judgment is reversed, and the action dismissed.

MOUNT, C. J., PARKER, and MORRIS, JJ., concur.

[No. 10242. Department One. October 1, 1912.]

JOHN H. McELROY, *Appellant*, v. ARTHUR E. HOOPER *et al.*, *Respondents*.[1]

ARBITRATION AND AWARD—JUDGMENT—VACATION—REVIEW. Under Rem. & Bal. Code, § 424, providing the grounds for exceptions to and award, and Id., § 430, providing that judgment on the award shall stand upon the footing of other judgments and be reviewed in the same way, a judgment on an award, unappealed from, is conclusive on a party to the arbitration, and cannot be attacked by a motion to vacate.

JUDGMENT—VACATION—ARBITRATION AND AWARD. The failure of arbitrators to determine all the questions involved, is error of law, that can be corrected only by appeal from the judgment, and not by motion to vacate the judgment.

JUDGMENT—VACATION—HUSBAND AND WIFE. The fact that the wife was not a party to a judgment against a husband on a community debt, and that the same may be enforced against community property, is not ground for vacating the judgment.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered November 16, 1911, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to vacate a judgment. Affirmed.

Merritt, Oswald & Merritt and *Samuel P. Weaver*, for appellant.

Barnes & Dillard and *Luby & Pearson*, for respondents.

[1]Reported in 126 Pac. 925.

Gose, J.—In July, 1910, John H. McElroy and Nina McElroy, his wife, commenced an action in the superior court of Adams county against Arthur E. Hooper, his wife, and three other persons, for the purpose of recovering possession of certain community real estate and for damages. At the same time they commenced a second action in the same court, against the same defendants, to recover damages for waste committed upon the property involved in the first suit. Upon the same day they commenced an action in the superior court of Lincoln county against Arthur E. Hooper, to recover damages for an alleged conversion of personal property. On the 11th day of February, 1911, John H. McElroy and Arthur E. Hooper entered into a written agreement conformably to the statute, Rem. & Bal. Code, § 420 *et seq.*, to arbitrate the matters involved in the three suits. This agreement was not signed by either of the other parties. On the 4th day of May two of the three arbitrators made and signed an award, which recites that: "We do hereby find and adjudge that there is now due and owing from the said John H. HcElroy to said Arthur E. Hooper the sum of $2,829.25," together with costs. The award was filed in the case first mentioned. On the 24th day of May, John H. McElroy filed his exceptions to the award upon technical grounds. On the 8th day of June, he moved to resubmit the matters involved to the same arbitrators, on the ground of newly discovered evidence. On the 12th day of June the exceptions were disallowed, the motion to resubmit was overruled, and judgment was entered upon the award against both John H. McElroy and Nina McElroy, for the full amount, with interest and costs. There was no appeal from this judgment. Thereafter John H. McElroy and Nina McElroy filed their petition for a vacation of the judgment under the provisions of Rem. & Bal. Code, § 464. The petition was denied as to the former and granted as to the latter, and a judgment was entered against the former for the amount of the former judgment

with interest and costs, and in favor of the wife for her costs. John H. McElroy has appealed.

Two grounds are urged by the appellant for a reversal of the judgment, (1) that all the questions presented to the arbitrators were not adjusted; and (2) that the agreement to arbitrate was not executed by all the parties to the suits.

These questions were not raised by the appellant, in either his exceptions or his motion to resubmit the cause to the arbitrators. The code, Rem. & Bal. § 424, provides that the aggrieved party may except to the award on the grounds (1) that the arbitrators misbehaved themselves; (2) that they committed error in fact or in law; and (3) that the award was procured by corruption or other undue means. The judgment affirming the award became final as to the appellant. The code, Rem. & Bal., § 430, provides that a judgment entered upon an award stands upon the same footing as other judgments, and the law is that it is subject to attack and review in the same way. 5 Cyc. 262; *Johnston v. Paul*, 23 Minn. 46; *Gaines v. Clark*, 23 Minn. 64; *McLeod v. Graham*, 132 N. C. 473, 45 S. E. 935.

It is also well settled that errors available upon the hearing of an award must be reviewed by an appeal from a judgment entered thereon. *Clark v. Thurmond*, 46 Ga. 97; 23 Cyc. 894. We have held that error of law is not made a ground for vacating or modifying a judgment under the provisions of the code, Rem. & Bal., § 464. *Dickson v. Matheson*, 12 Wash. 196, 40 Pac. 725; *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182. "Error of law cannot be corrected upon a petition to vacate a judgment." *Sound Inv. Co. v. Fairhaven Land Co.*, 45 Wash. 262, 88 Pac. 198. The same view is announced in *Warren v. Hershberg*, 52 Wash. 38, 100 Pac. 149, and *Robertson Mtg. Co. v. Magnolia Heights Co.*, 65 Wash. 260, 117 Pac. 1121.

It is undoubtedly true, as the appellant argues, that the award ought to be a complete adjustment of the controversies submitted to the arbitrators. The arbitrators did

not determine the question as to who had the right to the possession of the property involved in one of the suits. This was an error of law and open to appellant, (1) by exception; and (2) by an appeal from an adverse judgment. He failed to pursue this remedy, and the judgment as to him is final and conclusive.

The fact that the judgment may be enforceable against the property of the community cannot change the rule. The husband has the management of the community property. As the community profits by his good judgment, so it must bear the loss of his mistakes. It cannot accept the one and repudiate the other.

Affirmed.

CROW, MORRIS, and PARKER, JJ., concur.

[No. 10264. Department Two. October 2, 1912.]

ALBERT HANSEN, *Respondent*, v. E. J. ROUNDS *et al.*, *Appellants*.[1]

PLEADING—DEPARTURE—IMMATERIAL VARIANCE. A judgment for personal injuries should not be set aside for failure to prove the facts precisely as alleged, where the evidence sustained the substance of the issue, and there was not a substantial departure.

Appeal from a judgment of the superior court for King county, Myers, J., entered November 14, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

Murphy & Wall, for appellants.

Parker & Brown, for respondent.

PER CURIAM.—This is an action for personal injuries. The case has heretofore been before us on the question of the sufficiency of the complaint. 62 Wash. 247, 113 Pac.

[1]Reported in 126 Pac. 927.

633. After the remittitur went down on that appeal, the case was tried to a jury on the facts, and resulted in a verdict and judgment against the appellants.

On this appeal, the appellants question the sufficiency of the evidence to sustain the verdict and judgment. It is objected that the respondent did not prove his case as laid in his complaint. But without setting out the objections in detail, it seems to us that they go rather to the technical accuracy of the proofs than their sufficiency as a matter of substance. The substance of the issue was not whether the respondent was injured in the precise manner alleged in the complaint, but was rather whether he was injured substantially as so alleged. That the evidence sustains the substance of the allegations of the complaint it seems to us there is little question. The respondent was directed to assist in doing a particular work, and took a position in obedience to his directions that would have been safe enough had the defendants performed their part of the work in the manner they told him they would perform it. The defendants, however, did not do the work as they said they would do it. On the contrary, they performed it in a very different manner, and in such a manner as to make the plaintiff's position dangerous in the extreme, the result of which was that he was injured. This, as we say, was the substance of the issue, and is not such a departure from the technical allegation of the complaint setting forth the injury as to require a reversal or a new trial.

There was no error in the ruling of the trial court, and the judgment will stand affirmed.

[No. 10694. Department One. October 8, 1912.]

THE STATE OF WASHINGTON, *on the Relation of W. J. Hindley et al., Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *J. Stanley Webster, Judge, et al., Respondents.*[1]

MUNICIPAL CORPORATIONS—ORDINANCES—AMENDMENT — INITIATIVE POWER—PETITION—CONSIDERATION—PRESUMPTIONS. Under a city charter providing that the city clerk shall file and present to the city council an initiative petition by 15 per cent of the electors, and that the city council shall, within ten days, either pass the ordinance without alteration or submit it to popular vote, the petition will be held *prima facie* sufficient, where the council delayed all action and there is no affirmative showing that it considered or rejected the petition on the ground of insufficiency.

MUNICIPAL CORPORATIONS—CHARTERS—AMENDMENTS—ELECTIONS—GENERAL OR SPECIAL. Const., art. 11, § 10, providing that a city charter "may" be amended by proposals therefor submitted to the electors at "any general election," does not exclude other methods; hence, under the constitutional authority to cities of the first class to adopt special charters not "inconsistent" with the constitution and laws, a city may provide for proposed amendments to its special charter to be submitted to the electors at a special election.

SAME—CHARTERS—SCOPE OF AMENDMENTS. Amendments to a special charter of a city of the first class that may be submitted at a special election are not confined to those that are only revisory or supplemental, but include those which alter or annul the basic principle upon which the city government is founded.

SAME—SCOPE—STATUTES—AS "NOW" PROVIDED. A provision in a city charter authorizing the city to submit the matter of proposed amendments to the electors in the manner "as is now provided," refers to the charter at the time the amendment is proposed, and not to the time when the law was passed.

SAME—SUBMISSION TO VOTERS—WARDS—PROCEEDINGS. A proposed amendment to a city charter is not insufficient in that it requires the election of alderman by wards when there are at present no wards in the city; that being a mere detail for which the city council can provide.

[1]Reported in 126 Pac. 920.

SAME—AMENDMENTS TO CHARTER—INITIATIVE PETITION—SIGNATURES—WITHDRAWAL. The right to withdraw a signature from an initiative petition is a personal one to the signer, and cannot be exercised by one who circulated the petition.

Certiorari to review a judgment of the superior court for Spokane county, Webster, J., entered August 22, 1912, granting a writ of mandamus, after a hearing before the court. Affirmed.

H. M. Stephens, *W. E. Richardson*, and *Ernest E. Sargeant*, for relators.

Morrill, Chester & Skuse, for respondents.

PER CURIAM.—The superior court of Spokane county, Washington, J. Stanley Webster, Judge, having issued a writ of mandate directing the commissioners of the city of Spokane to call an election giving the people of that city an opportunity to vote upon proposed charter amendments, an appeal having been taken, and a supersedeas denied (*Cooper v. Hindley, ante* p. 259, 126 Pac. 916, decided September 28, to which reference should be made), the defendants, the present relators, sued out a writ of certiorari to this court. Return having been made and the merits of the case being properly before us, we will consider the objections of the present relators, the commissioners, in the order in which they have been presented.

It is urged as a reason why the relators should not be compelled to call an election in accordance with the petition, that the record does not show, and that the fact is, that the commissioners have not passed upon the sufficiency of the petition. This objection is without merit. Section 82 of the charter of Spokane provides that the initiative power of the people shall be exercised as follows:

"(a) Petition: A petition signed by qualified electors of the city, accompanied by the proposed legislation or measure in the form of a proposed ordinance, and requesting

that such ordinance be submitted to a vote of the people, if not passed by the council shall be filed with the clerk.

"(b) Clerk's Certificate: Within two days from the filing of such petition the clerk shall certify the number of votes cast at the last general municipal election, and the number of signers of such petition, and shall present such certificate, petition and proposed ordinance to the council.

"(c) Action by Council Upon Petition: Fifteen Per Centum Petition: If such petition be signed by qualified electors in number equal to 15 per centum of the total number of votes cast at the last preceding general municipal election, the council, within 10 days after the receipt thereof, except as otherwise provided in this charter, shall either pass such ordinance without alteration, or submit it to popular vote at a special election which must be held within 30 days after the date of the ordering thereof. Provided, however, that if any other municipal election is to be held within 60 days after the filing of the petition, said proposed ordinance shall be submitted without alteration to be voted upon at such election."

It is clearly indicated by these provisions that a duty rests upon the commissioners and the city clerk. If the clerk certifies the petition to the council as sufficient in that it is signed by the requisite number of qualified electors, and no affirmative showing of consideration or rejection on that ground is made, we hold the petition to be *prima facie* sufficient. If it were not so, the commissioners could, by mere neglect, defeat a right which the people of the city have by express provision reserved to themselves. Speaking to the general law, the act of 1903, chap. 186, p. 393, which is in all essentials similar to the charter provision now under consideration, the court said, in *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609:

"Some one must determine that fact, and under the statute it must lie with the council to pass upon it in the first instance. It is generally held, under similar statutes, that it is the duty of the body to whom petitions for the submission of questions to the voters are presented to carefully scrutinize, examine, and determine as to the number and

qualification of the signers before putting the people to the expense of an election."

The records show that the electors' petition in this case was filed on May 22, 1912, and relators' answer in the mandamus proceeding on August 7, 1912, during which time nothing was done by the council in the way of determining the qualifications of the petitioners. But we understand from the argument of counsel that the real reason for rejecting the petition was that relators were advised that an election could not be held prior to the time fixed for the next general election, which would be in December, 1913. Where it is thus manifest that the sufficiency of the petition was not a question considered by the commissioners at the time it was certified to them, but that its consideration was postponed upon other grounds, it would seem that that question should be foreclosed in a proceeding of this character.

Coming now to the main issue, that is, whether an election can be presently called, relators rely primarily upon that part of art. 11, § 10, of the state constitution, which reads as follows:

"Such charter may be amended by proposals therefor submitted by the legislative authority of such city to the electors thereof at any general election, after notice of said submission published as above specified, and ratified by a majority of the qualified electors voting thereon."

This article has been considered by the court in a number of cases, in all of which it has been held that a city is bound by the general laws of the state, but that the purpose and intent of the constitution was to give to cities of the first class, having the right to adopt their own charters, the fullest power in that respect, provided only that their acts shall be consistent with and subject to the constitution and general laws. The word "consistent" may have been inadvertently used by the framers of the constitution. Literally it would imply that there had been either legislative or

constitutional expression upon the particular subject under review. But it has been given its evident meaning and so applied by this court in many cases; that is, that a city with its own charter may legislate upon every subject not inconsistent with or hostile to the statutes or constitution or, as said in *Bussell v. Gill*, 58 Wash. 468, 108 Pac. 1080, 137 Am. St. 1070:

"The object of this constitutional provision was to secure to all such cities complete local self-government in municipal affairs, subject only to the restrictions mentioned, and charter provisions adopted under the authority so conferred should not be held invalid, unless it appears that they are in direct conflict with the constitution or laws of the state."

See, also, *Walker v. Spokane*, 62 Wash. 312, 113 Pac. 775; *Hindman v. Boyd*, *supra*.

With this provision and its judicial construction before it, the freeholders committee, which prepared the present charter for the city of Spokane, provided:

"Section 125. Amendment of the Charter:

"This charter may be amended by a majority vote on such amendments. The provisions of this charter, with respect to submission of legislation to popular vote by the initiative, or by the council of its own motion, shall apply to and include the proposal, submission and adoption of amendments. The council may make further regulations for carrying out the provisions of this article, not inconsistent herewith."

See, also, par. (c), § 82, above quoted.

In the light of the legislation of the past twenty years, both state and municipal, and the purpose of the constitution to give the fullest measure of self-government to cities of the first class, and especially when considered in the light of that which has gone before in the same article; that is, "*all* elections in this section [Sec. 10] shall only be had upon notice . . . said elections may be general or special," etc. To give the words "such charter . . . may be

amended at any general election" an imperative mandatory construction would destroy or unreasonably postpone the initiative power of the people, "a power which is superior to that of the corporate authorities." *Hindman v. Boyd, supra.*

Our attention is called to the words of this court in *State ex rel. Wiesenthal v. Denny*, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214:

"General elections were selected as the time for submission [of charter amendments], because there ought to be a certain stability about such instruments [charters], and the vice of non-attention to special elections is well known."

This expression was made at a time when amendments could be proposed only by the council, the then "legislative authority." The theory that charter amendments can be proposed only by the commissioners is proposed in relators' briefs, but is now abandoned. However logical the argument in the *Denny* case may be, the electorate of the city of Spokane have seen fit to abandon the theory of representative government, and have provided for the initiation of amendments at any time, and that a vote thereon shall be had within thirty days after their proposal. The construction put upon the constitution in the *Denny* case, that an election upon charter amendments must be held at a general election, is consistent so long as it applies to the former methods of legislation; but the word "may" should not be given that meaning when the people are acting in their sovereign capacity. Although not directly raised, the principle was discussed, and we think decided, in *State ex rel. Lambert v. Superior Court*, 59 Wash. 670, 110 Pac. 622. The governing body there, as here, insisted that an election of freeholders to frame a charter should be had only at a general election, and it had so ordered. This court, speaking through its then Chief Justice, said:

"The election for the choice of freeholders is put off almost a year, or until the next general election, and for the like reason, or for no reason at all, the election to adopt or ratify

the charter might be put off until the next general city election or for two years longer. We are convinced that the legislature did not intend any such consequence as this. In other words, we are of the opinion—as was the court below—that the elections provided for must be held within a reasonable time, and may be general, if a general city election is to be held within a reasonable time thereafter; but otherwise, they must be special. We are further of opinion that the election was not called within a reasonable time, and that the city council abused the discretion vested in it by law."

It was also held that § 7499 of the code provides that an election for the adoption of a new charter shall be called immediately. This we held to mean within a reasonable time. While the court said in *Reeves v. Anderson*, 13 Wash. 17, 42 Pac. 625, that the case of *State ex rel. Wiesenthal v. Denny*, *supra*, had been reexamined, and that it did not militate against its then holding, if the force of law be given to that part of the *Denny* decision above quoted, the two cases nevertheless seem to be in conflict. Only by rejecting it as dictum or a statement made *arguendo* can the two decisions be harmonized. In the *Reeves* case it was argued upon the authority of the *Denny* case that "with reference to the time, mode and manner of changing a charter, the course to be followed is a mandate, but as to the question as to whether the city will avail itself of the provision of the constitution [art. 11, § 10] to frame a charter, it is permissive."

"However, we think that the mode pointed out by the latter part of § 10, art. 11, for submitting proposed amendments to a vote of the people, is not to be construed so as to exclude every other method. It will be observed that this concerns merely the *manner* of proposing and submitting the amendment, and it rests with the voters in any case to adopt or reject such proposition. . . .

"Third. The argument of the learned counsel for appellants in support of the third objection to the constitutionality of the law under consideration is based very largely upon the use of the word 'may' in the constitution, as relating to the duty of the city council. The argument amounts

to this, that, notwithstanding under the constitution the power to frame a charter for their own government is lodged in the voters of a given city, still it cannot be exercised unless permission to do so is given by the council, which may exercise its own pleasure in granting or withholding the opportunity to vote for the election of freeholders to prepare a charter. We cannot accede to this contention. To admit of such a construction is to unreasonably abridge, if indeed it might not even prevent, the exercise of the power thus conferred and subject it always to the mere caprice or arbitrary determination of the council, something which surely was not intended by the framers of the constitution." *Reeves v. Anderson, supra.*

Recurring now to our premise that the words "consistent with" mean "not hostile to," and considering the spirit of the constitution, that is, to grant the fullest measure of self-government to cities of the first class, subject to the general laws, it would result in a contradiction of terms if we were to hold that, although the manner of proposing amendments was in strict harmony with the intent of the constitution to insure home rule to cities, the charter was nevertheless hostile to the constitution in such degree that its remedial processes are dependent upon the discretion of the commissioners and might thus be indefinitely postponed.

It is also said that amendments referred to and provided for in the charter are only such revisory or supplemental changes as the working of the present charter may suggest, and should not be held to refer to amendments which alter or annul the basic plan or principle upon which the city government is founded. It would be dangerous indeed for courts to draw a line between amendments, or to classify them in any way; for the whole question is a political one, to be determined by the people themselves. This they may do and should have the fullest right to do, without suggestion or interference by the courts. To hold to the contrary would subject the will of the people to judicial control, and by construction merely defeat, or unreasonably postpone,

the power reserved in the new charter. In *Wade v. Tacoma*, 4 Wash. 85, 29 Pac. 983, it is said:

"It may well be presumed that the constitution makers intended to guarantee to the citizens of cities as full and complete a notice of the amendments as of the original charters. In fact there is no reason why they should not. There is no difference in the effect or operation of charter laws because one happens to be in the original charter adopted and the other an amendment to such original charter. The amendments may effectually supplant or destroy the original charter and institute a new policy altogether."

In other words, the courts will not concern themselves with methods or results if, after public notice, the popular will may be expressed.

It may not be out of place before closing this part of our discussion to refer to § 7506 of the code. Our opinion is that this section is in itself sufficient to exempt the city of Spokane from the operation of § 7504, "the general law," where the words "general election" also occur. The words "as is now provided," in § 7506, must be held to relate to the charter of a city, not as it was at the time the act of 1903 was passed, but at the time the amendment is proposed.

Our decision has not been arrived at without some difficulty, for the truth is that most of the cases we have referred to were decided with reference to a government decidedly different from that of the city of Spokane. The people of that municipality have rejected the representative system, and adopted what is known as a commission form of government, or, more accurately speaking, a direct government by the people, fortified by certain adjuncts, hostile in a great degree to the former system as evidenced by what is popularly known as the initiative, referendum, and recall. This adoption was sustained in *Walker v. Spokane, supra*, and having there decided that the constitution warrants the selection of these measures, to hold with relators would virtually destroy the spirit of that decision, and in effect

decide that all municipal governments of like character are impotent to assert or execute the rights reserved by the people of the municipality. We would give to them the form of self-government, but deny the substance. The old charter provided for, and the councilmen were elected by, wards. The new charter provides that the governing body shall consist of five commissioners, elected by the whole body of the electors. The proposed amendments provide that ten councilmen shall be elected by wards. It is contended that, inasmuch as the present charter supplanted the old one, no wards exist, and it is therefore impossible to comply with the order of the court. This is a mere matter of detail. We will presume that the commissioners will take such steps as may be necessary to give effect to the will of the people in this regard if it be so expressed at the polls.

Some point is made to the effect that, inasmuch as any petitioner can withdraw his name from a petition prior to the time it is acted upon by the council (*State ex rel. Mohr v. Seattle*, 59 Wash. 68, 109 Pac. 309), therefore, one who has circulated a part of the petition can withdraw that part and the names upon it. We cannot so hold. The right to withdraw, like the right to sign, is a personal privilege, and can be exercised only by the person directly concerned.

Finding no reason in the constitution or the general laws of the state for the denial of the right of the people of the city of Spokane, as voiced by the petition, to vote upon the proposed charter amendments within the time fixed in the charter, the judgment and order of the lower court is affirmed.

[No. 10715. Department One. October 4, 1912.]

THE STATE OF WASHINGTON, *on the Relation of James A. Moore, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.[1]

VENUE—CHANGE OF VENUE—PREJUDICE OF JUDGE—COURTS—JURISDICTION. The act, Laws 1911, p. 617, requiring a change of venue on the filing of an affidavit of prejudice of the trial judge, is imperative, and with the transfer the court acquires full jurisdiction to determine all questions as to where the case shall be tried.

PROHIBITION—TO COURTS—SCOPE—REMEDY BY APPEAL. Prohibition does not lie to prevent the trial of an action by a court to which a change of venue is taken on account of prejudice of the judge; since the court acquired jurisdiction and there is an adequate remedy by appeal.

Application for a writ of prohibition, filed in the supreme court September 23, 1912, to restrain the superior court for King county, Albertson, J., from proceeding with the trial of a cause. Denied.

Scott Calhoun, for petitioner.

Bausman & Kelleher, for respondent.

PER CURIAM.—This case was transferred from Jefferson county to the county of King under the act of 1911. Laws 1911, p. 617. The affidavit for the change was based upon the prejudice of the trial judge, and venue was changed upon that ground. When the case came on for hearing in the superior court of King county, the plaintiff, the relator here, denied the right of the court to proceed, insisting that the case should be remanded to Jefferson county until such time as the question of the prejudice of the judge, the character of the action, and the convenience of witnesses could be heard and determined in that court. Relator's objection to a trial in the superior court of King county having been overruled, he comes here, asking for a writ of prohibition.

[1]Reported in 126 Pac. 926.

The statute of 1911 has been construed by this court in *Garvey v. Skamser*, 69 Wash. 259, 124 Pac. 688; *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 118 Pac. 40, and *State ex rel. Nelson v. Yakey*, 64 Wash. 511, 117 Pac. 265, to be imperative. With the change of venue, the superior court of King county acquired full and complete jurisdiction, and if for any cause the case should not be tried in King county, the statutory remedies for changing the venue are still open to the relator.

Moreover, we are of opinion that prohibition is not a proper remedy in this case. The superior court of King county having jurisdiction, all questions going to procedure or the merits of the case can be raised upon appeal. *State ex rel. Port Orchard Inv. Co. v. Superior Court*, 31 Wash. 410, 71 Pac. 1100; *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, 111 Am. St. 925, 2 L. R. A. (N. S.) 895; *State ex rel. La Furgey v. Superior Court*, 47 Wash. 154, 91 Pac. 639; *State ex rel. Skamser v. Superior Court*, 65 Wash. 457, 118 Pac. 344.

The writ is denied.

[No. 10062. Department Two. October 5, 1912.]

CHARLES I. D. LOOFF *et al.*, *Appellants*, v. SEATTLE PARK COMPANY *et al.*, *Respondents*.[1]

LANDLORD AND TENANT—LEASE—CONSTRUCTION. Where an amusement company leased a portion of its premises, described as five certain lots, for the purpose of an amusement park, the lessee agreeing to pay as rent a percentage of the gate receipts, and not to conduct any bathing establishment, cafe, restaurant or skating rink on the lease premises, and for a time all the property was included within a common inclosure, and the lessor conducted a bathing establishment, cafe, and skating rink on property reserved and not mentioned in the lease, a clause in the lease that the whole of said "eight lots" shall be open to the public upon the payment of a general admission, is meaningless, and the covenants of the lease can refer

[1]Reported in 126 Pac. 902.

only to the five lots described; hence the lessee has no right to control the admission to or the nature of amusements conducted on the lessor's portion of the premises reserved from the lease, and an injunction will therefore not lie to close the lessor's public entrances to the common inclosure and forbidding the lessor to call attention to his free entrances to the grounds; the lessee's remedy being to inclose his own portion of the premises, or by a suit to reform the lease, if it does not express the agreement of the parties.

SAME—CONSTRUCTION BY PARTIES. In such a case, the fact that for several years, the only public entrance to the grounds was in charge of the lessee during the summer months while his amusement park was in operation, and that the lessor conducted no amusements on its property other than those prohibited to the lessee, does not aid the construction of the writings, when their subject-matter does not cover the lessor's reserved property, and where the subsequent conduct of the parties may have been the result of independent agreements.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 6, 1911, in favor of the defendants, after a hearing before the court, dismissing an action for equitable relief. Affirmed.

Wilmon Tucker and *Thomas B. MacMahon*, for appellants.

Ira Bronson, for respondents.

FULLERTON, J.—On January 11, 1907, the appellant Looff entered into a written agreement with the respondent Seattle Park Company, reading as follows:

"It is hereby agreed by and between the Seattle Park Company, a corporation, the party of the first part, and Charles I. D. Looff, the party of the second part, as follows:

"(1) The party of the first part agrees upon the completion of this contract as hereinafter set forth, to lease to the party of the second part the premises described as follows and upon the terms as hereinafter set forth: The easterly five (5) lots in block 456 of the Seattle tidelands and an undivided one-half (½) of block 455 of the Seattle tidelands, for the term expiring on the 31st day of August, 1916, subject to renewal as hereinafter set forth.

"(2) It is agreed that the party of the second part shall pay for said lease the sum of $6,521.67 at the signing hereof, the receipt whereof is hereby acknowledged, and shall pay in manner and form as set forth in that certain lease made by the West Seattle Land and Improvement Company to W. W. Powers, J. L. Ward and assigned to the party of the first part, expiring on said 31st day of August, 1916, one-half of the ground rent reserved in said lease.

"(3) All taxes and assessments levied against the improvements and buildings which the party of the second part shall cause to be erected upon the premises described as the easterly five (5) lots of block 456, and one-half of all taxes and assessments levied upon any improvements and buildings erected upon block 455, and one-half of all the taxes and assessments levied upon the premises exclusive of improvements included in blocks 455 and 456.

"(4) The party of the second part agrees to pay to the party of the first part twenty per cent of the gross gate receipts received for general admission to said premises, not including, however, admissions charged for any particular entertainments or amusements situated thereon.

"(5) It is expressly covenanted and agreed that the party of the second part shall have the right to conduct such forms of amusement and entertainment on the said easterly five (5) lots of block 456 as he may desire, including the sale of candies, popcorn, ice cream and soft drinks and cigars, and all slot machines and nickel-in-the-slot machines, except as follows: That the party of the second part shall not conduct any bathing establishment, any cafes, any restaurant or any skating rink on said premises; And the party of the first part shall not conduct any amusements except as specified on said premises.

"(6) It is further agreed that the party of the second part shall keep a strip of ground 50 feet wide easterly and westerly, extending from the north line of said block 456 to the south line thereof, and being westerly fifty feet of lot four therein, clear of obstructions, buildings or improvements as an open way for the general public, and both parties agree that the whole of said eight lots shall be open to the public upon payment of general admission, of which the party of the first part receives twenty per cent and the

party of the second part receives the balance of eighty per cent, except special places of amusement properly enclosed.

"(7) It is further provided that if the lease from the West Seattle Land and Improvement Company to the party of the first part above described shall be extended for any period of time, that the lease herein provided for shall be extended for a corresponding period and upon the terms and conditions above set forth.

"(8) The party of the second part expressly guarantees to expend the sum of $100,000 in the building and erection of such forms of amusement and entertainment as are included within the terms of this lease upon the premises demised to him on or before the first day of August, 1907, and to begin in substantial manner the expenditure of said money and the erection of said improvements on or before the first day of February, 1907.

"(9) It is further agreed that time shall be the essence of this agreement and that if the party of the second part shall fail to begin the erection of said improvements or to complete the same as herein provided for, that all rights under this contract shall cease at the option of the party of the first part, and that the party of the first part shall have the right to keep and retain the payment made at the signing hereof, as liquidated damages for said failure.

"(10) All improvements to be erected upon block 455 shall be paid for in equal proportions by the parties of the first and second parts hereof, and all revenues derived therefrom shall be equally divided between the parties hereto.

"(11) It is further agreed that a daily report shall be made by the party of the second part to the party of the first part of the gross gate receipts paid for admissions to all of said premises.

"(12) Said lease shall be executed and delivered to the party of the second part upon the completion of the terms of this contract as above set forth."

On June 25, 1908, pursuant to the foregoing agreement, the parties entered into a lease as follows:

"This Indenture, made this 25th day of June, in the year of our Lord one thousand nine hundred and eight, between the Seattle Park Company, the party of the first part, and Chas. I. D. Looff, the party of the second part.

"Witnesseth: That the said party of the first part does by these presents lease and demise unto the said party of the second part the easterly five (5) lots in block four hundred and fifty-six (456) of the Seattle tidelands and an undivided one-half (½) of block four hundred and fifty-five (455) of the Seattle tidelands, for the term expiring on the 31st day of August, 1916, subject to renewal as hereinafter set forth, with the appurtenances. Said term beginning with the date hereof.

"The party of the second part agrees to pay as rental for said premises in the manner as set forth in that certain lease made by the West Seattle Land & Improvement Company to W. W. Powers and J. L. Ward, and which lease has been assigned to the party of the first part, and which expires on the 31st day of August, 1916, one-half of the ground rent reserved in said lease, and further the party of the second part agrees to pay all taxes and assessments against the improvements and buildings which the party of the second part, his successors or assigns shall cause to be erected upon the premises, described as the easterly five lots of block 456, and one-half of all the taxes and assessments levied upon the premises, exclusive of improvements included in blocks 455 and 456.

"The party of the second part agrees to pay to the party of the first part twenty per cent of the gross gate receipts received for general admission to said premises, not including, however, admissions charged for any particular entertainments or amusements situated thereon.

"It is expressly covenanted and agreed that the party of the second part shall have the right to conduct such forms of amusement and entertainment on the said easterly five lots of block 456 as he may desire, including the sale of candies, popcorn, ice cream and soft drinks and cigars and all slot machines and nickel-in-the-slot lunch machines, except as follows:

"That the party of the second part shall not conduct any bathing establishments, any cafes, any restaurants or any skating rink on said premises: And the party of the first part shall not conduct any amusements except as specified on said premises.

"It is further agreed that the party of the second part shall keep a strip of ground 50 feet wide easterly and westerly,

extending from the north line of said block 456 to the south line thereof, and being westerly fifty feet of lot four therein, clear of obstructions, buildings or improvements as an open way for the general public, and both parties agree that the whole of said eight lots shall be open to the public upon payment of general admission of which the party of the first part receives twenty per cent and the party of the second part receives the balance of eighty per cent, except special places of amusement properly enclosed.

"It is further provided that if the lease from the West Seattle Land & Improvement Company to the party of the first part above described shall be extended for any period of time, that the lease herein provided for shall be extended for a corresponding period and upon the terms and conditions above set forth.

"All improvements to be erected upon block 455 shall be paid for in equal proportions by the parties of the first and second parts hereof, and all revenues therefrom shall be equally divided between the parties hereto.

"It is further agreed that a daily report shall be made by the party of the second part to the party of the first part of the gross gate receipts paid for admissions to all of said premises.

"And it is hereby agreed, that if any rent shall be due and unpaid, or if default be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and remove all persons therefrom; and that the said party of the second part does hereby covenant, promise and agree to pay the said party of the first part the said rent in the manner hereinbefore specified. And at the expiration of said term the said party of the second part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit (damage by the elements or fire excepted)."

While the evidence is not as clear as it might have been made, it can be gathered that Looff, between the date of the agreement and the date of the lease, erected on the lots described in the lease various structures intended for entertainment and amusement purposes, at a cost exceeding that named in the agreement, and that the respondent erected on

the lots remaining in the block a bathing establishment, a skating rink, and a building for restaurant purposes and established a restaurant therein. The whole of the block was inclosed as one tract, and seems to have had but one principal entrance, which opened into the part leased to Looff. The amusement structures put in by Looff were attractive only during the summer months, and were operated by him only during those months. The establishments put in by the respondent were of a different nature, and could be operated to some extent at all times of the year, or at least for a longer period than Looff found it profitable to operate his amusements. The grounds were first opened to the public in 1907, the exact time not appearing. During this year, the place of admission was the main entrance spoken of, which seems to have been in the sole charge of Looff. An admission fee of ten cents was exacted from each visitor, which was divided between the parties in accordance with the ratio fixed in the agreement. How this particular admission charge was determined upon is not shown, but presumably by agreement between the parties; at least, the record is silent as to any disagreement thereover. Looff closed his attractions about the 1st of October following. At this time the main entrance was closed and a fence erected along the dividing line of the two properties, shutting off the public entirely from the property controlled by Looff. The respondent continued to operate its part of the grounds. At what place it opened an entrance to its grounds does not appear with certainty, but it is probable that the public were admitted at a gate used by the parties when the main entrance was open as a place for the admittance of teams carrying supplies and fixtures. It does not appear what, if any, admission fee was charged by the respondent during this period.

Looff again opened his attractions between the first and middle of May, 1908. At this time the fence between the respective parts of the grounds was removed, the point of admission confined to the main entrance, and an admission fee

of ten cents charged as a general admission to all parts of the grounds, the money received therefor being divided as before. This condition continued until the 1st of October, 1908, when Looff closed his attractions for the year. The main entrance was again closed, the division fence erected, and the public visiting the place confined to the respondent's portion of the ground, the point of admission presumably being at the place the public was admitted during the previous closed season. The same course was pursued with reference to the spring of 1909, Looff again opening his attractions at the beginning of May of that year. At the close of the year, however, while the main entrance was closed and the gateway leading to the respondent's grounds opened, no division fence was immediately erected owing to some difficulty between the parties. But it was found later that persons admitted to the respondent's grounds would pass over onto those belonging to Looff and injure and destroy the unguarded property. To stop this, the division fence was erected just before the Christmas holidays. Another difficulty also arose between the parties during this season. The respondent conducted certain games and amusements on its part of the grounds which Looff claimed could, under the terms of the lease, be operated only by himself. An action was begun to restrain their operation, but the trial court decided that their operation was not in violation of the terms of the lease. The judgment of the trial court was affirmed by this court on appeal. *Looff v. Seattle Park Co.*, 59 Wash. 217, 109 Pac. 806.

In the year 1910, when Looff decided to open his grounds, the respondent refused to close its entrance gate. At first it charged a nominal admission fee of one cent, but later discontinued this, and admitted free any person who desired to enter the grounds. It also stationed persons in the street in front of the main entrance, which Looff had opened and was charging an admission fee of ten cents, to call attention to the free gate at another part of the inclosure. The

actions of the respondent were conceived to be in violation of the covenants contained in the contract and lease, and this action was instituted by Looff and his coplaintiff to restrain the same, and to require the respondent to account to the appellant at the rate of ten cents each for the number of persons who had been admitted to the common grounds by the respondent at its entrance gate. Issue was taken on the complaint, and resulted in a judgment in favor of the respondent to the effect that the appellant take nothing by this action. This appeal is from the judgment so entered.

In his brief on this appeal the appellant claims that he is entitled to the following specific relief: (1) An injunction against the respondent, closing all public entrances to the common inclosure except the main entrance before described as entering on the appellant's property; (2) either damages because of the admission of persons at the gate of the respondent, or an accounting for them at the rate of ten cents for each person; and (3) an injunction forbidding the placing of persons in front of the general entrance to call attention to the free entrance on the respondent's part of the grounds. In the course of the argument, it was further contended that, by the terms of the writings as interpreted by their subject-matter and the acts of the parties thereunder immediately following their execution, Looff has the right to require that all persons admitted to the general ground shall enter at the main gate first opened to the public; that he has the right to control the same and to fix and determine what fee shall be charged for admission to the common inclosure; that he has the right to collect such fees, being obligated to account to the respondent for only its proportional share of the same; and that he has the right to open his own ground all or any part of a year, and to determine for himself what season of the year such grounds shall remain open if less than the entire year, and that the respondent must conform its conduct to his acts.

A comparison of these claims with the written conditions of the contract and lease will show that they have but slight foundation on which to stand. Unless the paragraph numbered 6 of the contract, copied verbatim into the lease, is an exception, the covenants all relate to the leased premises. Clearly the phrase "said premises," found in paragraph numbered 4, also copied verbatim into the lease, refers only to the leased premises, as no other premises had up to that time been mentioned. The paragraph numbered 6 provides that both parties agree that "the whole of said eight lots shall be open to the public," but it is impossible to tell what it here referred to for want of an antecedent to the phrase "the whole of said eight lots." Up to this time only five lots in block 456 have been mentioned, namely, the easterly five lots of that block. The natural inference would be that the phrase relates to these specific lots, and that the word "eight" should be "five;" otherwise it is meaningless. The phrase "all of said premises," in paragraph numbered 11, of course can refer only to the premises before described, and if these be only the leased premises, it of course relates to them. This paragraph, moreover, adds nothing to the conditions of the lease, except a covenant requiring the lessee to account daily for the admission receipts. Otherwise he would be obligated to account for such receipts at reasonable times only. The writings, therefore, are intelligible only on the theory that the covenants contained therein relate solely to the leased premises. So construing them, they become at once intelligible and workable instruments, while to attempt to apply the covenants to property in addition to the leased premises results only in confusion. This was the thought that was in the mind of the court when it rendered the decision hereinbefore cited, and induced us to say that the writings contained no restriction on the right of the respondent to use its own premises in its own way for any lawful purpose.

It was earnestly contended there, however, as it is now contended, that the writings refer to other property than merely the leased premises. We answered then, as we answer now, that if this be so, the writings do not express the agreement of the parties, and the remedy "is by action for reformation, and not an action based on a covenant that does not exist." The writings are not aided by reference to their subject-matter or by reference to the conduct of the parties immediately following their execution. When the contract was executed, the lots, in so far as the record discloses, were naked of any improvements, and no new covenants were entered into at the time of the execution of the lease. On the contrary, the lease contains only the covenants of the contract that were not fulfilled at the time of its execution. A reference, therefore, to the subject-matter of the writings in no way aids in their interpretation. Nor does the conduct of the parties following the execution of the writings aid in their interpretation. In so far as it appears from the evidence, the subsequent conduct of the parties may have been the result of agreements independent of the writings entirely; and inasmuch as there is no apparent relation between the covenants contained in the writings and such conduct, the inference is that it was the result of agreement rather than an effort to execute the supposed covenants of the writings. We conclude, therefore, that the appellant has no remedy for the matters complained of in his complaint, under the covenants of the lease.

It may be well, however, to remark that we do not think that our construction of the writings leaves the appellant stranded and helpless, as his argument seems to imply. We have no doubt of his absolute right, as the contract now exists, to inclose his portion of block 456, cutting it off entirely from the part in possession of the respondent, and conduct therein such enterprises as he may deem fit, other than those specially mentioned as forbidden. On the other hand, if the writings do not express the real agreement between

the parties, the remedy is by an action to reform it so as to make it conform to the actual agreement.

There is no error in the record, and the judgment will stand affirmed.

MOUNT, C. J., MORRIS, and ELLIS, JJ., concur.

[No. 10071. Department Two. October 5, 1912.]

In the Matter of the Estate of DOROTHY DRURY SIEBS. GEORGE W. DRURY, *Appellant*, v. JENNIE D. MOULTON *et al.*, *Respondents.*[1]

WILLS—CONTEST—"PERSONS INTERESTED." Where the testatrix's father, who would have inherited the estate if no will had been made, was so far insane as to be incapable of managing his own affairs until his own death, his son as his heir may maintain a contest of the will, being a "person interested" in the will, within the meaning of the statute respecting a will contest.

WILLS—MENTAL CAPACITY—EVIDENCE—SUFFICIENCY. A testatrix is not shown to have sufficient capacity to execute a will ten days before she was declared insane, where prior to the execution, she had shown grave symptoms of the affliction, from the first she declined more or less rapidly, and ten days after the will was executed she was found unsafe to be at large, and was confined and finally died from the effects of her infirmity.

LIMITATION OF ACTIONS—DISABILITIES—MENTAL CAPACITY — EVIDENCE—SUFFICIENCY—WILLS—CONTEST. There is no sufficient evidence of insanity or incapability of understanding one's legal right so as to toll the statute of limitations, respecting the institution of a will contest, where it merely appears that a man, seventy years of age, retired from active business after meeting with an accident affecting one of his legs, which, with his corpulence, prevented his walking or getting around, and that he believed in spiritualism, and manifested deeply-felt religion by Bible reading, prayer, and singing; while other evidence showed that he retained control of his affairs and had no infirmity of mind.

DESCENT AND DISTRIBUTION — HEIRS—PRESUMPTION — DEATH AND DIVORCE—WILLS—CONTEST—BURDEN OF PROVING HEIRSHIP. Where a testatrix, dying without issue, had separated from her husband

[1]Reported in 126 Pac. 912.

three years before her death, her next of kin, in order to contest the will, must show that the husband was dead or divorced at the time of her death; there being no presumption from the lapse of such period of time.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered May 19, 1911, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to set aside a will. Affirmed.

Albert E. Joab and *Charles Bedford* (*Kappler & Merillat*, of counsel), for appellant.

T. W. Hammond, for respondents.

PER CURIAM.—On April 30, 1902, Dorothy Drury Siebs died in Pierce county, state of Washington, leaving an estate therein consisting wholly of personal property. She left a will in which she bequeathed the property to her sister, Jennie Drury Moulton, appointing her sister sole executrix of the will, and providing therein that the executrix should be permitted to act as such without bonds, and without the intervention of the courts further than to admit the will to probate. The will was duly probated on May 5, 1902, and Mrs. Moulton confirmed as executrix thereof. She at once assumed the duties of her office, administered the estate according to the terms of the will, and thereafter filed her final report as such executrix. Her report was approved, and her discharge entered by order of the court on May 30, 1903. The will of Mrs. Siebs was executed on July 25, 1899. Ten days thereafter, she was adjudged insane, on the complaint of Clarence E. Moulton, husband of Jennie Drury Moulton, the beneficiary of the will. She was committed to the care of Clarence E. Moulton, and by him placed in a private sanitarium, where an effort was made to effect her cure. Her affliction was diagnosed as a form of paresis, and her condition, after improving for a short time, rapidly became worse, until she became hopelessly insane some fifteen months after

her commitment. She was then taken from the sanitarium and placed in the Western Washington Hospital for the Insane, where she died from the effects of her infirmity, on the date above given.

The immediate relatives of Mrs. Siebs were the sister who was named as the beneficiary of the will, her brother, George W. Drury, who resided in the city of Washington, and her father, William C. Drury, who also resided at the city of Washington. Her father, at the time of her death, was approaching his sixty-fifth year, and died at his home in Washington on May 28, 1908, some six years after the death of his daughter. The record also speaks of the husband of Mrs. Siebs. While the pleadings are silent concerning him, the evidence shows that she was living with him at Bridgport, Connecticut, as late as the early months of the year 1899; that she separated from him after that time, coming west with her sister, to whom she had written for aid in the latter part of May of that year. The record is silent as to his further existence, and neither party seems to have thought his existence a matter of any consequence.

The present proceeding, to revoke and set aside the will, was begun by George W. Drury on March 31, 1909, some seven years after the will had been admitted to probate, and some ten months after the death of his father, William C. Drury. The will is attacked on the ground that Mrs. Siebs was incompetent to make a will at the time it was executed, being then of unsound mind. The seeming bar of the statute of limitations is sought to be escaped by the allegation that the contestant's father was the sole heir at law of Mrs. Siebs, that the father was insane and incapable of managing his own affairs from a time before the death of Mrs. Siebs until his own death, and that the petitioner was one of the heirs at law of his father, and hence was entitled to institute a contest of the will as soon as he became entitled to share in his father's estate. On their appearance, in response to the citation served upon them after the filing of the contestant's pe-

tition, the respondents first contended that the contestant had not shown sufficient interest in the will to enable him to maintain a contest thereof; which contention being overruled, they answered to the merits, putting in issue the allegations of insanity with reference to both Mrs. Siebs and William C. Drury. On the issues thus framed, the trial judge determined the facts in favor of the sanity of both parties, and dismissed the proceedings. The contestant appealed.

The respondents urge in this court the want of sufficient interest in the will in the appellant to enable him to maintain a contest thereof. They contend that a "person interested in any will," within the meaning of that phrase as it is used in the statute, must be a person who would himself, but for the will, have inherited the property devised and bequeathed thereby, and that the contestant is not such a person. But without specially reviewing the reasons advanced to support the contention, we think it is not well founded. If it be true that William C. Drury would have inherited the property of Mrs. Siebs but for the will, and if it be true, further, that he was so far insane as to be incapable of managing his own affairs from a time preceding the death of Mrs. Siebs until his own death thereafter, then his heirs at law have, we think, such an interest in the will of Mrs. Siebs as to enable them to maintain a contest thereof. We have found few cases directly in point, but the following may be consulted as bearing more or less strongly on the question: *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668; *Brady v. McCosker*, 1 Comstock (1 N. Y.) 214; *Van Alen v. Hewins*, 5 Hun 44; *Burnett v. Milnes*, 148 Ind. 230, 46 N. E. 464; *In re Langevin*, 45 Minn. 429, 47 N. W. 1133.

On the merits of the controversy, the evidence makes it clear that Mrs. Seibs had shown grave symptoms of the affliction which finally destroyed her life, for a considerable period of time preceding the day on which she executed the will; and notwithstanding she went about its execution as a rational person usually goes about such an undertaking, the

evidence raises in our minds grave doubts whether she was sufficiently sane on that day to comprehend fully the consequence of her acts. At certain times she appeared to have greater mental capacity than she exhibited at others, but from the time the symptoms of the disease were first observed upon her, she declined more or less rapidly, and we think it is too much to say that she was competent to execute a will only ten days prior to the time it was found unsafe to permit her to go longer without restraint.

As to William C. Drury, however, we find no sufficient evidence in the record to warrant a conclusion that he was insane, or so far demented as to warrant the conclusion that he was incapable of understanding his legal rights or of managing his own affairs, either at the time of Mrs. Siebs' death or between that time and the time of his own death. Great stress is laid on the fact that he ceased active business some time prior to the death of Mrs. Siebs, and thereafter secluded himself closely in his own home, living the life of a recluse. But the record shows a reason for his conduct. He was approaching his seventieth year, had met with an accident which affected one of his legs, and had become very corpulent during the later years of his life, all of which greatly interfered with his ability to get around. Indeed, one of the contestant's own witnesses testified to the difficulty he had in walking but a short time before he retired from active business, saying that it took him more than a half an hour to travel a distance which would require an active person but two or three minutes.

It was shown also that, for a time at least, Mr. Drury attended spiritualistic gatherings, and seemingly had faith in the doctrine of spiritualism; that he believed in the materialization of spirits, and apparently other spiritualistic phenomena, and sometimes spoke of having communed with his deceased wife. But it is not necessarily an evidence of insanity to believe in spiritualism. The great majority of civilized human beings believe in a life beyond the grave.

Based upon that belief, many widely different religious creeds have been established, and the fact that an individual may believe in one of these and discard others is not evidence of unsoundness of mind, even though the creed selected may be the less common belief and, to the majority of mankind, less capable of being defended than some that are more common. No one belief has a monopoly of men of intellectuality. It is well known that many of the clearest and brightest intellects have firmly believed in the doctrine of spiritualism, and in the reality of spirit manifestations that ordinarily accompany the practice of its teachings. But it is said that Mr. Drury, while alone in his room, would read from the Bible in a loud tone of voice, would engage somewhat vociferously in prayer, and would sing hymns whose wordings were not altogether congruous, to tunes not found in the hymnal. But this was nothing more than the manifestation of a deeply-felt religion. Mr. Drury was fast approaching the end of the span allotted to the life of man. It is to be supposed that his faculties had become somewhat dimmed, that his memory would not at all times recall the words of songs as they were written, and that his voice had lost some of the freshness of youth. But this is not insanity. It indicates merely a slowing up of the mental powers that uniformly comes with the declining years of man and foretells his final dissolution.

On the other side, there is abundant evidence that Mr. Drury maintained his sanity to the last. It was shown that, notwithstanding he quit active business some time before his death, he never lost control of his affairs; that while the actual work of looking after his affairs was performed by agents, yet those agents were under his direct supervision, and no change of even minor importance was made without his sanction and approval. He was told of his daughter's death and of the contents of her will, both by letter and orally, shortly after the death occurred, and expressed his approval of the manner in which the daughter disposed of her property. His death was the result of diseases of the body and not of

the mind. If the diagnosis be correct, the immediate cause of his death was "senile gangrene of the left foot," a disease in no way connected with an infirmity of the mind. But it is needless to pursue the inquiry. There is, in our judgment, no cause for believing Mr. Drury insane at any time between the death of his daughter and his own death.

The conclusions we have reached on the case as it is presented to us calls for an affirmance of the judgment of the court below. There is, however, another matter connected with the record, not dwelt upon by counsel for either side, that seems to us equally fatal to the contestant's case. Elsewhere we have mentioned the fact that the record shows that Mrs. Seibs was a married woman at a time some six months prior to the date she was adjudged insane, and that it is silent as to any other fact concerning her husband. If the husband was alive and undivorced at the time of Mrs. Siebs' death, he, and not William C. Drury, was the sole heir of her estate. Rem. & Bal. Code, § 1364. There can be no presumption from the short time that elapsed between the separation and his wife's death that he was either dead or divorced, and it was incumbent upon the appellant to show one or the other of these facts in order to have a standing as a contestant of his sister's will. Not having so shown, it follows that the judgment would have to be affirmed, even were we to decide the questions actually presented in the appellant's favor.

The judgment is affirmed.

[No. 10074. Department Two. October 5, 1912.]

THE STATE OF WASHINGTON, *on the Relation of W. V. Tanner, Attorney General, Appellant,* v. NORTHWESTERN INVESTMENT COMPANY *et al., Respondents.*[1]

BUILDING AND LOAN ASSOCIATIONS—FRANCHISE—FORFEITURE—ACTIONS—PREREQUISITES—NOTICE—ORAL PROOF—COMPETENCY. Where the state auditor orally notified the attorney general that he deemed it unsafe or inexpedient for a building and loan association to continue to transact business, which by Rem. & Bal. Code, § 3620, is a prerequisite to suit by the attorney general, such notice may be proved by any competent witness who was present and heard the communication.

CONTINUANCE—ABSENCE OF EVIDENCE—ABUSE OF DISCRETION. In an action by the state to dissolve an unlawful building and loan association, tried by the court without a jury, it is an abuse of discretion to refuse a continuance for less than one day to enable the state to obtain competent proof of the prerequisite auditor's notice to the attorney general to prosecute the suit, if, by any misunderstanding, counsel for the state had failed to prove such preliminary fact.

BUILDING AND LOAN ASSOCIATIONS—FRANCHISE—FORFEITURE—ILLEGAL BUSINESS—EVIDENCE—SUFFICIENCY. A suit is warranted by the attorney general to dissolve a corporation which was doing a building and loan association business without complying with the laws relative to such corporations, and without investing any capital of its own, where it had so extravagantly and wastefully managed its affairs that it had cost the investors $100,000 to invest $50,000 of their own money.

SAME—ILLEGAL BUSINESS — DEFENSES — ESTOPPEL — CONSENT OF STATE OFFICIALS. Engaging in the business of a building and loan association without complying with the laws governing such corporations is against public policy, and the fact that the state auditor gave his consent thereto on the advice of the attorney general does not estop the state from proceeding against the corporation to prevent a continuance of the business.

SAME—FORFEITURE OF FRANCHISE—ILLEGAL BUSINESS—RIGHTS OF INVESTORS TO ASSETS. Where a corporation illegally engaging in a building and loan association business has accumulated a fund that

[1]Reported in 126 Pac. 895.

belongs to the investors, and sought to transfer its assets to a legally incorporated company, the investors are entitled to have the fund distributed without further reduction than the necessary cost of administering it; and the newly organized building and loan association should be dissolved, where it appeared to be organized for the sole purpose of taking over and administering the fund.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 8, 1911, upon granting a nonsuit, dismissing an action to forfeit corporate franchises. Reversed.

The Attorney General and *S. H. Kelleran, Assistant*, for appellant, contended, among other things, that the respondent corporations are amenable to the laws regulating building and loan associations. *Conaway v. Co-Operative Homebuilders*, 65 Wash. 39, 117 Pac. 716; *Land Title & Trust Co. v. Fulmer*, 24 Pa. Sup. Ct. 256. The charters are subject to forfeiture for wilful nonuser, misuser, or usurpation of powers granted. *State ex rel. Hadley v. Delmar Jockey Club*, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574; *International Fraternal Alliance v. State*, 86 Md. 550, 39 Atl. 512, 40 L. R. A. 187; *State v. Interstate Sav. Inv. Co.*, 64 Ohio St. 283, 60 N. E. 220, 83 Am. St. 754, 52 L. R. A. 530; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456; *People v. North River Sugar Ref. Co.*, 121 N. Y. 582, 24 N. E. 834, 18 Am. St. 843, 9 L. R. A. 33; *People ex rel. McIlhany v. Chicago Live Stock Exchange*, 170 Ill. 556, 48 N. E. 1062, 62 Am. St. 404, 39 L. R. A. 373; *People ex rel. Stewart v. Young Men's Father Matthew T. A. B. Soc.*, 41 Mich. 67, 1 N. W. 931; *Hartnett v. Plumbers' Supply Ass'n*, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194; *State ex rel. Attorney General v. Central Ohio Mut. Relief Ass'n*, 29 Ohio St. 399; *State ex rel. Attorney General v. Milwaukee, Lake Shore & W. R. Co.*, 45 Wis. 579; *People ex rel. Attorney General v. Utica Ins. Co.*, 15 Johns. 358, 8 Am. Dec. 1243; *People v. Mercantile Co-operative Bank*, 53 App. Div. 295, 65 N. Y. Supp. 766; *State ex rel. Attorney General v. Seneca County Bank*, 5

Ohio St. 171; 2 Morawetz, Private Corporations, § 1024. A business which is dependent for its existence upon chance or upon lapses and forfeitures enforced against those in contract relations with it, and which must meet inevitable failure if all persons with whom it contracts perform, is against good morals and against public policy, and should be destroyed. *State v. New Orleans Debenture Redemption Co.*, 51 La. Ann. 1827, 26 South. 586; *New Orleans Debenture Redemption Co. v. Louisiana*, 180 U. S. 320; *State ex rel. Prout v. Nebraska Home Co.*, 66 Neb. 349, 92 N. W. 763, 103 Am. St. 706, 60 L. R. A. 448; *State v. Interstate Sav. Inv. Co., supra; Bettle v. Republic Sav. & Loan Ass'n*, 63 N. J. Eq. 578, 53 Atl. 11; *Walker v. United States*, 152 Fed. 111; *Fidelity Funding Co. v. Vaughn*, 18 Okl. 13, 90 Pac. 34, 10 L. R. A. (N. S.) 1123. A building and loan association is said to be insolvent when the assets are insufficient to repay the amounts of money which the shareholders have already paid in. Endlich, Building Associations, § 511. Thompson, Building Associations, § 289; *Bettle v. Republic Sav. & Loan Ass'n, supra; Towle v. American Bldg., Loan & Inv. Soc.*, 61 Fed. 446; *Chapman v. Young*, 65 Ill. App. 131; *Commonwealth ex rel. McCormick v. Pennsylvania Bldg. & Loan Ass'n*, 20 Pa. County Ct. Rep. 589. Or, when its available assets are below the level of stock paid in, and it is unable to pay its shareholders (contract holders) dollar for dollar. *Continental Nat. Bldg. & Loan Ass'n v. Miller*, 44 Fla. 757, 33 South. 404; *Bingham v. Marion Trust Co.*, 27 Ind. App. 240, 61 N. E. 29; *People v. New York Building Loan Banking Co.*, 41 Misc. 363, 84 N. Y. Supp. 844. Or, when it is unable to carry to completion the purposes of its existence. *Gunby v. Armstrong*, 133 Fed. 417. The attempted transfer of the business, assets and liabilities from the Northwestern to the Inland, was beyond the powers of each of said corporations, and void. *Trowbridge v. Hamilton*, 18 Wash. 686, 52 Pac. 328; *Bankers' Union of the World v. Crawford*, 67 Kan. 449, 73 Pac. 79, 100 Am. St. 465; *Whaley v. Bankers' Union of*

the World, 39 Tex. Civ. App. 385, 88 S. W. 259. The proceedings for voluntary dissolution of the Northwestern do not prevent maintenance of this proceeding. *People v. Seneca Lake Grape & Wine Co.*, 52 Hun 174. The companies are insolvent within the rule of *State ex rel. Jenkins v. Equitable Indemnity Ass'n*, 18 Wash. 514, 52 Pac. 234. In any event, they are impotent and should be wound up and a receiver appointed under the authority of *Conlan v. Oudin*, 49 Wash. 240, 94 Pac. 1074; *State ex rel. Conlan v. Oudin & Bergman Fire Clay Min. & Mfg. Co.*, 48 Wash. 196, 93 Pac. 219; *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167, 104 Pac. 207.

R. M. Webster and *Fred M. Williams*, for respondents, contended, *inter alia*, that the state is estopped to oust respondents. Thompson, Corporations (2d ed.), p. 1035, par. 1974; *People ex rel. Howard v. Schnepp*, 179 Ill. 305, 53 N. E. 632; *People ex rel. Roeser v. Gartland*, 75 Mich. 143, 42 N. W. 687; *Walker v. United States*, 139 Fed. 409; *United States v. Johnston*, 124 U. S. 236, 254; *Chicago, St. Paul, M. & O. R. Co. v. Douglas County*, 134 Wis. 197, 114 N. W. 511, 14 L. R. A. (N. S.) 1074; *Commonwealth v. Heirs of Andre*, 3 Pick. 224; *State ex rel. Sanche v. Webb*, 110 Ala. 214, 20 South. 462; *People ex rel. Gridley v. Farnham*, 35 Ill. 562; *Comanche County v. Lewis*, 133 U. S. 198; *People v. Perrin*, 56 Cal. 345; *Attorney General v. Joy*, 55 Mich. 94, 20 N. W. 806. After the delay of the state in instituting action until the rights of third parties became vested, it cannot now so act as to impair such vested rights. *Oregon Mortgage Co. v. Carstens*, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841; *Abrams v. State*, 45 Wash. 327, 88 Pac. 327, 122 Am. St. 914. The transfer of the assets of the Northwestern Investment Company to the Inland Building & Loan Association is valid. *Spare v. Home Mut. Ins. Co.*, 17 Fed. 568; *LaRue v. Groezinger*, 84 Cal. 281, 24 Pac. 42, 18 Am. St. 179; *Empire Pav. & Const. Co. v. Prather's Adm'r*,

58 Mo. App. 487; *Devlin v. Mayor, etc. of New York*, 63 N. Y. 8; *Brown v. Chambers*, 12 Ala. 697; *Cochran v. Strong*, 44 Ga. 636; *Carr v. Waugh*, 28 Ill. 418. The trustees of a corporation seeking voluntary dissolution are the proper authorities to close the business of the corporation. Rem. & Bal. Code, § 3707; Thompson, Corporations, § 2845; Cook, Stock and Stockholders, 641; *Brown v. Schleier*, 112 Fed. 577.

FULLERTON, J.—This is a proceeding, brought in the name of the state by the attorney general, to forfeit the franchises of the respondent corporations. The ground upon which the proceeding is based is, in substance, that they have conducted a building and loan business within the state without complying with the laws relative thereto; that they have misused franchises which they have, and have exercised franchises which they have not; that their business is fraudulent and contrary to law; and that they are insolvent. Issue was joined on the allegations of the complaint, and a trial entered upon, which proceeded until the close of the state's case in chief, when the respondents moved for a nonsuit and for a dismissal, on the ground that the state had failed in its proofs to maintain the allegations of its complaint. This motion the court granted, and the state appeals.

The respondent Northwestern Investment Company had its origin in July, 1909, when it was incorporated under the name of the National Home Building Company. It continued under that name until December 22, 1909, when the name was changed to the National Home Company. It adopted its present name on November 14, 1910. The articles of incorporation under which the company operated were broad and comprehensive. It was empowered to buy, own, sell, encumber, convey, and deal in real estate and personal property; to borrow money and give security for the same; to loan money and take real estate, mortgages, notes,

bonds, and other evidences on commission or otherwise, and to deal generally in commercial paper. The company, however, engaged in but one class of business, namely, a business partaking of the nature of a building and loan association. It issued and sold to its investors a form of contract calling for an initial payment of $6, and monthly payments of $6 each, until eighty of such monthly installments should be paid, when the contract was to "be deemed to be paid up," and the holder entitled to be paid "the total amount paid on the contract," together with the holder's proportional share of the funds "accruing from lapses, fines, transfer fees, simple and compound interest earnings, and any other surplus accretions to the reserve and loan fund of the series to which the contract belonged," as soon as the amount in said fund to the credit "of the contract equaled seven hundred and twenty dollars, which is the maturity value of" the contract; further "subject, however, to the provisions of paragraph 18 on the back" thereof. Paragraph 18 provided that not more than fifty per cent of the accumulations to the reserve and loan fund for any one month should be used for the making of cash settlements or redeeming paid-up certificates. The contract also contained provisions for fines and forfeitures and the nonpayment of installments when due, and for loaning the funds accumulated in the loan and reserve fund to the contract holders. It also provided that:

"Four dollars and seventy-five cents ($4.75) from each and every monthly installment received hereon [meaning the contract] after the third installment, together with the return payments for loans granted, including simple and compound interest, the profits derived from the contributions to the reserve and loan fund from lapses, paid up certificates, and any necessary apportionments made hereunder by the company, including all fines and transfer fees, and all other surplus accretions, shall be placed to the credit of the reserve and loan fund for making loans to, or making settlements with, the holders of contracts in the series to which this contract belongs."

The contract itself does not provide for the disposition of the three monthly installments first paid on the contract, nor the $1.25 retained out of the several monthly payments, but it was elsewhere provided that these sums should form a part of the corporation's expense fund, out of which the expense of administering the fund and its office expenses should be paid. The corporation continued business from the date of the organization until June 22, 1911. Between these dates it issued some four thousand contracts, on which it received $151,162. Of this sum it transferred to its expense fund $94,018.87, and to its reserve and loan fund $57,143.13. It also received on its stock subscription of $100,000 the sum of $2,975, which it transferred to its expense fund. Out of its expense fund it has paid, for organization, furniture and fixtures, commissions, legal expenses, and miscellaneous purposes, the sum of $95,374.98. It has made forty-five loans of $1,000 each, and has but $11,276.77 in its reserve and loan fund. Of the four thousand contracts, all were in default on June 12, 1911, except five hundred and sixty-six. The by-laws of the corporation provided for the forfeiture of the contract and the sums paid thereon for nonpayment of the monthly installments as they matured. It seems, however, that it was the policy of the company to allow a defaulted contract holder to reinstate himself at any time by paying the delinquent installments with the accumulated fines and penalties. Few, however, seem to have availed themselves of the opportunity thus offered, and the tendency of the number of nondefaulted contracts was to grow constantly less instead of greater. The Northwestern Investment Company was not incorporated as a building and loan association, nor did it attempt to comply with the laws of the state relating to such corporations. On June 22, 1911, it transferred its business to its co-respondent, Inland Savings & Loan Association, and petitioned the court for leave to dissolve. This petition was pending on the institution of the present proceedings. The Inland Savings & Loan Associa-

tion was incorporated as a building and loan association under the laws of this state. Its organization was not perfected when this proceeding was instituted, and it has done no business further than to receive payments on the going contracts turned over to it by its co-respondent.

The record does not directly advise us as to the grounds upon which the trial court rested its judgment, but it can be gathered from the remarks of the judge, made while passing upon objections to the admission of evidence and on the motion for nonsuit, that it was thought that the state had not shown authority in the attorney general to institute the proceedings, and that on the merits no cause was shown authorizing the relief sought by the state. The respondents insist on these objections in this court, and suggest others in their briefs, some of which we shall notice in their order.

The record, as it comes before us from the trial court, lends color to the first objection stated, but we think the fault causing it to be thus barren lies rather within the trial court itself than with counsel representing the state. The statute relating to building and loan associations provides (Rem. & Bal. Code, § 3620), that if it shall appear to the state auditor, from any examination made by him, that a building and loan association is violating its charter or the law, or that it is conducting business in any unsafe, unauthorized, or dishonest manner, or that if it shall appear to the auditor that it is unsafe or inexpedient for such corporation to continue to transact business, he shall communicate the facts to the attorney general, who shall thereupon be authorized to institute such proceedings against such corporations as the occasion may require. To meet this provision of the statute, the state alleged in its complaint that the state auditor deemed it unsafe and inexpedient for the respondent corporations to continue to transact business, and communicated the facts relating thereto to the attorney general; and on the trial it offered evidence tending to support the allegation. This evidence, the trial court rejected, on the ground that it

was not competent, and refused to continue the hearing of the case until such time as evidence could be brought to the place of trial which would meet the objections of the court. In both of these rulings, we think the trial court erred. It appeared that the communication made by the auditor to the attorney general was made orally, and the state sought to show the fact by a witness who was present and heard the communication made. This the court ruled to be incompetent; ruling further that only the auditor making the communication, or the attorney general to whom it was made, could testify to the fact. But the fact in controversy was whether or not the communication was made, and the nature of the communication; not whether the same was true. Hence, any person, otherwise competent to testify, who was present and heard the communication, is a competent witness to testify to the fact. 1 Greenleaf, Evidence, § 100; Jones, Evidence, § 300.

The rule that admits such evidence is akin to the rule permitting proofs of an oral contract. Obviously any person who stands by and hears an oral contract made between two persons can testify, not only as to the making of the contract, but as to its terms. So here, the question being whether the state auditor had communicated a certain state of facts to the attorney general, obviously any person, otherwise competent to be a witness, can testify, not only to the fact that such a communication was made, but as to the nature of the communication. But were the rule otherwise, we think the court erred in refusing to postpone the hearing until competent witnesses could be called. The case was being tried without a jury. The inquiry was one of public concern, made by one of the state's officers on the authority, it was alleged, of the state itself. If, by some misunderstanding of the facts or law of the case, the attorney in charge of the proceedings failed to produce competent testimony of a mere preliminary fact, it surely would be an abuse of discretion on the part of the court to refuse him an

opportunity to correct the mistake when the delay would cause as little inconvenience as it would in this instance—a delay of perhaps sixteen hours at the longest.

The question whether or not the state has made a sufficient showing to authorize the dissolution of these corporations and the winding up of their affairs seems to us also to be free from difficulty. The mere recital of the facts concerning their financial transactions we have hereinbefore made shows the necessity for such a course. All of the vast sum of money paid into these concerns was paid in by persons seeking an investment for small sums saved from their daily earnings. The promoters of the enterprise risked nothing of their own therein, and morally and equitably they stood to the investors as trustees of a trust fund; yet so extravagantly and wastefully has the fund been managed that practically two-thirds of it has been consumed in the care of the remainder. In other words, it has cost the investors in the enterprise practically $100,000 to have invested of their own money for their own use $50,000. Any enterprise or business that shows such results as this should not be permitted to operate with the sanction of the state.

Among the contentions for affirming the judgment, suggested by counsel in their briefs, is the contention that the state is now estopped from inquiring into the legality of the business of these corporations. It appears that, when the original corporation was organized and commenced doing business, the state auditor instituted an inquiry into the legality of such business; that, during the course of the inquiry, the matter was submitted to the attorney general, who gave it as his opinion that the business would be legal if certain conditions which he enumerated were complied with; that the auditor made known these conditions to the officers of the corporation, who forthwith caused the corporation to comply therewith, when consent was given by the auditor for a continuance of the business. These acts, however, do not in our opinion constitute an estoppel against the state. The

business conducted by the corporation, if not in itself fraudulent and illegal, is at least contrary to public policy. Its business is therefore contrary to law, and each separate transaction is a new offense against the law. While the state officers may in certain instances condone past offenses, they cannot grant indulgences authorizing the committal of new ones, and hence have no power to authorize the continuance of any act or business which is in violation of law. And so in the cases cited by counsel themselves. They are all cases where the state has sought to recover for past omissions which had once been condoned. None of them relate to a case where the offenses are continuous.

It is next insisted that the Inland Savings & Loan Association is a valid organization, or can be made such; and since it has taken over the business of the old corporation, the state ought not to be allowed to interfere without showing some default which it has committed, and that no such default has been shown. But the business of the old corporation is inherently vicious, and cannot be made legitimate by merely transferring it to a new corporation. The assets and funds if turned over to the new corporation should not be administered upon according to these so-called contracts. These assets and funds are the property of the persons who enabled the corporation to acquire them, and should be turned back to such persons without further reduction than the necessary costs of administering the fund. As the Inland company has no other business seemingly than to administer the fund, and has not otherwise perfected its organization, there would seem to be but little use for its further existence.

The contention that the contract issued by the original corporation is a valid contract has been sufficiently considered by what has been said on other branches of the case.

The judgment is reversed, and the cause remanded for a new trial.

MOUNT, C. J., MORRIS, and ELLIS, JJ., concur.

[No. 10147. Department Two. October 5, 1912.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v. RUDOLPH WADEKAMPER, *Respondent*.[1]

EVIDENCE—JUDICIAL NOTICE—ACT OF CONGRESS. Upon an issue as to the title of the Northern Pacific right of way, the courts will take judicial notice of the Act of Congress of July 2, 1864, granting a right of way to the company over public lands.

PUBLIC LANDS—GRANT TO RAILROAD—RIGHT OF WAY—NATURE—RELATION. Act of Congress of July 2, 1864, granting a right of way to the Northern Pacific Railroad Company over public lands is a grant *in praesenti*, taking effect by relation as of that date, upon definite location of the line, as against settlers acquiring public lands after the grant and before the location of the line.

STIPULATIONS—CONSTRUCTION—PUBLIC LANDS—RAILROAD GRANT—DEFINITE LOCATION OF LINE—PROOF. A stipulation that the date of the "definite location" of the Northern Pacific Railroad Company was in 1884, implies a compliance with all the conditions precedent to a valid definite location, and dispenses with proof (1) that the company located the line, (2) gave notice to the land department, and (3) that the selection was approved.

SAME. In a stipulation relating to the Northern Pacific right of way, the use of the word "railway" for "railroad" is immaterial, where it was stipulated that the Northern Pacific Railway Company was the successor of the Northern Pacific Railroad Company.

RAILROADS—RIGHT OF WAY—ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY. Actual possession of a railroad right of way for use as a railroad and telephone line is sufficiently shown by the testimony of a construction foreman of telegraphs that the railroad and telegraph line had been located as at present since 1887, crossing the land in question, and that the telegraph line is about forty feet from the center of the main track.

RAILROADS—TRESPASS—INJUNCTION—TITLE AND POSSESSION OF PLAINTIFF—THREATS—EVIDENCE—SUFFICIENCY. Injunction will lie to prevent trespass and protect possession of a railroad right of way actually used and in possession of the company under a claim of title, where the adjoining owner had notified plaintiff's telegraph construction foreman to keep off his land, and just prior to the suit had told an employee of a telegraph company, licensed by the

[1]Reported in 126 Pac. 909.

plaintiff, not to trespass on his land, and that it would not be safe for him to go there and erect wire, the defendant's objections being made to work on the plaintiff's right of way.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered October 3, 1911, in favor of the defendant, after a trial before the court, dismissing an action to enjoin a trespass. Reversed.

Geo. T. Reid, J. W. Quick, and *L. B. da Ponte* (*Englehart & Rigg*, of counsel), for appellant.

H. J. Snively and *I. J. Bounds*, for respondent.

ELLIS, J.—In this action plaintiff, Northern Pacific Railway Company, sought a preliminary and final injunction against an alleged trespass by the defendant upon its right of way and threatened interference with the telegraph line located thereon. The complaint alleged, that the Northern Pacific Railroad Company was incorporated by act of Congress, July 2, 1864, with power to build and operate a railroad and telegraph line from Lake Superior to Portland, Oregon, with a branch line to Puget Sound, and by the act was granted a right of way over the public lands of the United States; that pursuant to the act, the railroad company, in 1884, constructed a railroad and telegraph line across the north half of the southeast quarter and the northeast quarter of section 6, township 12, north, range 19, E., W. M., in Yakima county, and thereby became entitled to a right of way four hundred feet wide across that land as provided by the act; that the plaintiff is the successor and grantee of the Northern Pacific Railroad Company and owns the railroad and telegraph line, and that the railroad company and its successor, the railway company, ever since 1884 have been in possession of the right of way, paid taxes thereon, and used the same openly, continuously, and adversely to all persons; that on or about August 20, 1910, the defendant trespassed upon the right of way across the

above described land, and hindered and prevented the employees of the Western Union Telegraph Company in the use of the right of way and the stringing of wires on the telegraph poles thereon, which was being done with the plaintiff's consent and license; that the telegraph line is necessary to the operation of the railroad, and is for the joint use of the telegraph company and the plaintiff. The prayer was for a temporary restraining order, and that the same be made permanent upon final hearing. A temporary restraining order was issued, and the defendant failing to make return to a citation to show cause to the contrary, the order was continued in effect pending suit.

The defendant filed an answer, admitting the plaintiff's organization and capacity to sue, admitting the organization of the Northern Pacific Railroad Company, and the grant of a right of way over public lands of the United States, but denying the other allegations of the complaint. For a first affirmative defense the answer alleged that, "at the time the Northern Pacific Railway was located over the lands described in the complaint, the same were not public lands of the United States, but had passed from the United States to the owners, defendant's predecessors in interest, and that the Northern Pacific Railway Company never acquired any right in said land in virtue of said act of Congress." Adverse possession since the year 1871 was set up as a second affirmative defense. These affirmative matters were traversed by the reply. Trial was had to the court. The plaintiff introduced its evidence. The defendant challenged its sufficiency and offered no evidence. The court rendered judgment, dismissing the action at plaintiff's costs, and dissolving the restraining order. The plaintiff has appealed.

The evidence consisted of a stipulation of the parties, certain documentary evidence, and the testimony of witnesses. The stipulation is as follows:

"It is hereby stipulated that the Northern Pacific Railway Company is the successor and assignee of the Northern Pacific Railroad Company, a corporation created by act of Congress dated the second day of July, 1864, and that the Northern Pacific Railroad Company, by deed dated August 18th, 1896, transferred and conveyed to the Northern Pacific Railway Company its railroad, telegraph line, right of way and franchises and all its rights and privileges acquired under and by virtue of said act of Congress July 2nd, 1864, and the construction and equipment of said railroad in accordance with the terms of said act, and that said Northern Pacific Railway Company is now the owner of the same, subject, of course, to such rights as defendant may have in and to the land in controversy.

"It is further stipulated that R. Wadekamper is the grantee and successor of the entrymen and patentees of the United States in and to the lands in controversy, and has and owns all of the interest therein which may have been owned by said patentees and entrymen, as shown by certified copy of a certain letter dated May 9th, 1911, from the department of the interior to Britton & Gray, and as shown by the tract books of record in the United States Land Office at North Yakima, Washington, copies whereof are hereto attached.

"It is further stipulated and agreed that the date of the definite location of right of way and construction of the railroad of the Northern Pacific Railway Company through the premises in controversy herein was in the spring of the year 1884."

From the letter to Britton & Gray, referred to in the stipulation, which letter is in evidence, and from certified extracts from the tract books of the United States land office at North Yakima, also in evidence, it appears that there was no claim to, or entry filed upon, the land described in the complaint, until the year 1871. The construction foreman of telegraphs for the Northern Pacific Railway Company testified, that he had been in the service of that company since 1887, was familiar with the railroad and telegraph line of the railroad company across the land in question, and that it had been located as at present ever since the year 1887;

that since 1887 the telegraph line has been used by the Northern Pacific company for train dispatching and commercial purposes, the line extending from Portland to St. Paul; that this is the only telegraph line the company ever built; that as at first constructed there were four wires, which have since been added to from time to time until there are now seventeen; that the witness had strung four wires in the past five years; that about fourteen years ago the telegraph poles were renewed and the line rebuilt on the same ground, and the witness never heard of any objection being made thereto; that the telegraph poles are about forty feet from the center of the main railroad track actually in use, and that the main track has been in its present location ever since the witness can remember; that he knew of no change ever having been made in its location.

The witness testified that, on one occasion when he was stringing wires for the Northern Pacific Railway Company, the defendant forbade him from going on the land, but that he paid no attention thereto; that he knew that employees of the Western Union Telegraph Company were putting up the wires in August, 1910, about which complaint is made, and that the work was being done with his knowledge and consent. The district line supervisor for the Western Union Telegraph Company testified that he was familiar with the telegraph line across the land in question, and had a conversation with the defendant, who objected to the stringing of a wire thereon, telling the witness not to trespass on his property. The witness testified, "He told us it wouldn't be safe for us to go on there and erect a wire;" that the witness construed this as a threat of violence and desisted; that the matter was reported to the Northern Pacific Railway Company and, after a time, the witness was told to go ahead and put up the wire, which was accordingly done. The assistant line supervisor of the Western Union Telegraph Company corroborated this witness as to the defendant's interference with the work. It seems to be admitted that the wire was strung after the

temporary injunction was obtained. The county treasurer for Yakima county testified that the Northern Pacific Railway Company had paid all taxes on the right of way in Yakima county ever since the line was built; that the company made return to the assessor, showing the description and width, and the taxes were levied on so many lineal feet or miles of right of way, and the acreage of the right of way was deducted from the subdivisions assessed to other parties. The assessor stated that some taxes are now due. The inception of defendant's interest in this land, so far as the evidence shows, was by deed to him from one George Weigel and wife, dated March 26, 1903.

The respondent contends, and the court seems to have entertained the opinion, that the evidence failed to show title to the right of way in question in the appellant. Assuming that proof of title was essential to a maintenance of this action, we think the stipulation and evidence *prima facie* established it. This court will take judicial notice of the act of Congress of July 2, 1864 (13 Stat. at Large, 365), creating the Northern Pacific Railroad Company, and granting it lands in aid of construction and a right of way over the public lands. In construing this and similar grants, the supreme court of the United States and the Federal courts have repeatedly recognized a marked distinction between the land grant in aid of construction and the grant of the right of way. While both are grants *in praesenti*, the grant of the right of way is unlike the land grant in that, upon definite location of the line, it takes effect by relation as of the date of the grant. The doctrine is now firmly established that all persons acquiring any portion of the public lands, before the definite location but after the passage of the granting act, take the same subject to the right of way of the proposed road. *Railroad Co. v. Baldwin*, 103 U. S. 426; *Bybee v. Oregon & California R. Co.*, 139 U. S. 663; *Northern Pac. R. Co. v. Townsend*, 190 U. S.

267; *Northern Pac. R. Co. v. Murray*, 87 Fed. 648; *Nielsen v. Northern Pac. R. Co.*, 184 Fed. 601.

The respondent argues that, before this doctrine of relation can be invoked, there must be proof of (1) selection by the company of its line or route, (2) notice to the land department of such selection, (3) approval of the route by the land department; and it is contended that none of these things was proven. It may be conceded that all of these things are essential. They go to make up the definite location, as that term is understood and used in the authorities. It was stipulated: "That the date of the definite location of right of way and construction of the railroad of the Northern Pacific Railway Company through the premises in controversy herein was in the spring of the year 1884." This necessarily implies a compliance with all of the conditions precedent to a valid definite location, giving the right to construct the road upon the right of way so located. The stipulation must be construed to mean a valid definite location. Respondent also calls attention to the fact that the stipulation refers to the railroad of the Northern Pacific *Railway* Company, and not of the Northern Pacific *Railroad* Company. Taken in context this is immaterial. It was also stipulated that the railway company is the successor and grantee of the railroad company, and owns the railroad, telegraph line, right of way, franchises, rights and privileges acquired under the grant of July 2, 1864. The strained and technical interpretation of the stipulation invited cannot be invoked to defeat its obvious purpose and meaning.

It is also contended that there was no evidence that the right of way across this land was ever in possession of, or used by, the appellant or its predecessor. It is argued that the stipulation is silent as to whether any one was ever in actual occupancy of the land, and as to whether the appellant or the Northern Pacific Railroad Company ever operated any road on the land. This is true, but the appel-

lant's construction foreman of telegraphs testified that the railroad and telegraph line had been located on the land in question as at present ever since 1887 to his knowledge, and it cannot be questioned that as now located it crosses this land. He also testified that the telegraph line has ever since been used by the Northern Pacific for train dispatching and commercial purposes, the line extending from Portland to St. Paul, and that the telegraph line is about forty feet from the center of the main track actually in use. We think there was sufficient evidence to show an actual possession and use of the right of way across this land in the operation of both railroad and telegraph line, at least ever since 1887.

We are of the opinion also that the evidence was sufficient to establish *prima facie* an adverse and uninterrupted possession in the appellant and its predecessor since that time. On the whole record, we are constrained to hold that the right of the appellant to the right of way across the land in question was *prima facie* established. In any event, a present possession and use of the right of way by the appellant under a claim of title was fully established, and authority is not wanting that in such a case injunction will lie to protect such possession and use, leaving the question of title to be tried out in an appropriate action. *Pennsylvania Co. v. Ohio River Junction R. Co.*, 204 Pa. 356, 54 Atl. 259; *Pittsburg, S. & W. R. Co. v. Fiske*, 123 Fed. 760; *Kindred v. Union Pac. R. Co.*, 168 Fed. 648; *Cheesman v. Shreeve*, 37 Fed. 36.

Finally, the respondent contends that no acts or threats were proven sufficient to invoke the remedy by injunction. It is claimed that the evidence merely shows that he at one time warned the appellant's construction foreman to keep off of his—respondent's—land, and at another time told an employee of the Western Union Telegraph Company not to trespass on his—respondent's—land, and that it would not be safe for him to go on there and erect a wire. The

evidence shows that this last incident occurred just prior to the commencement of this action, and that it was reported to the appellant. Appellant's foreman of construction testified that the work was being done with his knowledge and consent. Moreover, the bringing of this action was of itself a sufficient ratification of authority from the appellant to the Western Union Telegraph Company to string the wire. While the respondent's warning was in terms to keep off his land, the words must be construed in the light of the circumstances. The wire was being strung upon the appellant's right of way and upon the appellant's poles. It was that work to which the respondent's objection was directed. The men to whom they were addressed evidently regarded them as a threat of violence in case the work was continued, and that was at least their most obvious and natural meaning. It appearing that a persistence in the work might have resulted in a breach of the peace, injunction was the proper remedy. *Pennsylvania Co. v. Ohio River Junction R. Co., supra.* The time has passed when the determination of rights of possession may be left to wager of battle. The injunction should have issued.

The judgment is reversed.

Mount, C. J., Fullerton, Parker, and Morris, JJ., concur.

[No. 10000. Department One. October 7, 1912.]

WILLIAM MILLER *et al.*, *Respondents*, v. W. F. WINSLOW *et al.*, *Appellants*.[1]

JUDICIAL SALES—SALE TO OFFICER—VALIDITY—CONFIRMATION OF SALE—EFFECT. An execution sale by a sheriff to himself is such a fraud on the rights of the owner as to be voidable if challenged within a reasonable time by a suit to redeem the property, notwithstanding the confirmation of the sale, which only cures irregularities that go to the record, and does not bar a suit by one who was defrauded.

JUDICIAL SALES—VALIDITY—SALE TO OFFICER—FRAUD—INADEQUACY OF PRICE. Where an execution sale by a sheriff to himself deters another purchaser from bidding, the sale operated as a direct fraud upon the owner, especially where there was a great inadequacy of price; and it is immaterial that the sheriff finally allowed the property to go to the other bidder.

JUDICIAL SALES—ILLEGAL SALE—REDEMPTION—RIGHTS OF PURCHASER—INTEREST ON TAXES PAID—RATE. Upon redemption from an illegal execution sale, the purchaser is not entitled to fifteen per cent interest upon taxes and assessments paid on the property, but only interest at the legal rate.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered July 5, 1911, in favor of the plaintiffs, after a trial on the merits before the court, in an action to quiet title. Affirmed.

Merrick & Mills, for appellants.

Coleman, Fogarty & Anderson, for respondents.

CROW, J.—This suit was brought to quiet title to four certain town lots in the city of Everett. The lots were sold by the sheriff to satisfy a lien for street improvements. The suit, while denominated an action to quiet title, is in reality a suit in equity to redeem the property from the defendants, who claim title under the sale. Many irregularities are charged, but we find it unnecessary to consider them. They

[1]Reported in 126 Pac. 906.

were probably all cured by the confirmation of the sale. The sale, however, cannot be upheld, for reasons which will presently appear. At the sale, which occurred December, 1909, the sheriff was the highest and best bidder and the property was knocked down to him. An opposing bidder, one Kuster, finding that the sheriff was bidding at the sale, ceased bidding and, immediately after the sale, charged him with being disqualified in virtue of his office to bid at his own sale, and demanded that the property be turned over to him, or in case of his refusal he—Kuster—would carry the matter into court and would also defeat a purchase of other property which the sheriff had bid in over him a few days before. Accordingly, the deputy who conducted the sale was directed to make out a certificate of sale to Clay & Kuster. This was assigned to W. F. Winslow, the father-in-law of Kuster. The present defendants, excepting George M. Buck, who is a mortgagee, are the record owners of the property, defendant Winslow claiming two of the lots, and defendants Doolittle the other two. The Doolittles have not appealed.

In February, 1910, plaintiffs tendered to defendants the amount which they believed to be due and, upon defendant's refusal to accept the amount so tendered, this suit was begun. The four lots were bid in for a nominal sum. The exhibits are not here, but it appears they brought $35 or $40 apiece. The record shows that the lots were worth at the time from $1,500 to $2,000. The only question is, therefore, whether the sale to the sheriff is a mere irregularity which has been cured by confirmation, or is such a fraud upon the rights of the plaintiffs as will avoid the sale. The weight of authority seems to sustain the proposition that a sale to a disqualified person is not, in the absence of a statute, void, but is voidable. We understand the word "void," when used in connection with judicial sales prohibited under a statute, to mean a nullity, or something that cannot be ratified. On the other hand, the word "voidable" used in this connection means that which may be avoided at

the suit of the interested party, but is nevertheless subject to ratification which may be made to appear by showing the lapse of time or the acceptance of benefits. The sale in this case being challenged within a reasonable time and in a proper proceeding, we think the law, as well as sound public policy, demands that the sale be held for naught. It is an ancient rule that the seller holding a trust relation to the thing sold cannot conduct the sale to his own advantage. This principle sustains our decision in the case of *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. 1105, and has been repeatedly applied when sheriff's sales have been attacked for the reasons here invoked.

"No sheriff . . . shall directly or indirectly purchase any property whatever, at any sale by virtue of such execution; and all purchases made by such sheriff, . . . or for his use, shall be void." Crocker, Sheriffs (3d ed.), § 486.

The rule as stated by Mr. Crocker is taken from the New York code, but the code is only declaratory of the general rule, which with its reasons is well stated in *Perkins v. Thompson*, 3 N. H. 144. The court says:

"It is apprehended, that the soundest policy forbids, that any person should be the purchaser of that which he is appointed to sell. The characters of vendor and purchaser of the same article, at the same time, are inconsistent, and cannot be united in the same person. As sheriff, this defendant was bound by his duty, in relation to the debtor and creditor, to procure the best price he could for the horse; but the moment he employed an agent to bid off the horse for himself, it became his interest to act in direct opposition to his duty. It never can be fit or proper to permit a sheriff to put himself in this situation. It is a situation neither safe to himself, nor to the debtor and creditor. Our statute makes it the duty of coroners to serve all writs and processes, where the sheriff is a party. 1 N. H. Laws 160. This provision is founded upon the manifest impropriety of calling upon, or permitting, the sheriff to act officially in a situation, where his interest might impel him to go counter

to his duty. If then the law will not permit a sheriff to serve his own writ, even by simply leaving a summons with the defendant, with what consistency can it be decided that a sheriff may be intrusted to sell goods upon an execution, where it is his duty to procure the best price he can, after he has employed an agent to purchase them, and has become interested in having them purchased as cheaply as may be? It is very possible, that a sheriff might sell an article for the full value, and still be himself the purchaser. But the temptation to act contrary to his duty is so great, he ought not to be permitted to act, where the temptation exists. Nor is this all. The sheriff has the means of lessening the price of the articles sold, by determining the time and place of sale favorably to his own views. And this might be so done, that no human tribunal could detect the fraud. If it were once decided in this court, that a sheriff might be interested lawfully in the purchase of articles, he himself was selling upon an execution, it would open an avenue to frauds, for the detection of which our courts have very inadequate means. And it seems to us, that every principle of public policy requires, that we should at once close this avenue forever, by holding, that in no case can a sheriff be interested in the purchase of an article, he is selling as a public officer, and by treating every such purchase as voidable, at the election of the debtor."

See, also, Kleber, Void Judicial Sales, 363 *et seq.*; Murfree, Sheriffs, § 1000; 24 Cyc. 29; 17 Am. & Eng. Ency. Law (2d ed.), 999; *Swortzell v. Martin*, 16 Iowa 519; *Goble v. O'Connor*, 43 Neb. 49, 61 N. W. 131.

It is most earnestly contended that the order of confirmation has cured and made valid the sale, if it was irregular or voidable only. The order of confirmation cures all irregularities, but it goes only to the record, and does not in any way operate to bar a suit to inquire into the sale or its consequences at the instance of one who has been defrauded thereby. *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614; *Jackson v. Ludeling*, 21 Wall. 616. But it is said that no fraud results in this case, inasmuch as the property was taken by Mr. Kuster at the sheriff's bid; that therefore the

property went to the highest bidder, which is all that plaintiffs can demand. It is likely that the property having been struck off to a disqualified person and the sale having been closed, its invalidity could not be cured by a voluntary assignment upon the part of the bidder (such was the legal effect of the sheriff's act), and that the property should have been re-offered in the manner provided by law. Although invited to discuss this phase of the case, we find it unnecessary to do so. We have referred to enough of Mr. Kuster's testimony to show that the sale operated as a direct fraud upon plaintiffs, in that the presence and act of the sheriff operated to produce the very result suggested in the New Hampshire case, a breach of duty; for the record shows that Kuster was not inclined to bid the fair value of the property, but was resolved to take it at the unopposed bid of his adversary. He says:

"When bids were called for, Harry Knowles said—I don't know just what language he used, but he designated how much he would have to have. As I understood, no bid under that would be accepted, and, in each instance, I opened the bidding with the amount he claimed he would have to have. There were several other people standing by and, in each instance, some one else raised my bid. On the first two lots I think there were—Q. Which were the first two? A. Seventeen and eighteen. There were—I don't remember just how many bids, but I think that there were five bids. There was a difference of fifty cents or a dollar a bid, and I made the first and I made the third bid and the fifth bid. I think on the first lot, anyway, there must have been five bids that way. On the next lot there was either three or five. I don't know which, and then J. F. Beard made a bid. I stopped; and it so happened that no one else made a bid and Harry Knowles declared the property sold. On thirty-one and thirty-two I think there were about three bids made. I am quite sure of that as I made the first or opening bid, as I said a minute ago, and I made the third bid and Beard came in and bid again on those, and I quit. Q. Was Beard higher than you? A. He bid higher than I did . . . . A. At the sheriff's office, in the vestibule

or entrance, and I insisted that my bid should be recognized and that I should be declared the buyer of the property. I talked to him presuming that he had authority to tell the deputy whom to make that to and presuming that he, being the highest bidder here at the entrance, would want to have it declared sold to him. I told him that if he did not have that declared sold to me that I would take the matter into court—I would hire an attorney and give him a scrap on it."

The exact question before us has never been discussed by this court, but we said in *Coughlin v. Holmes*, 53 Wash. 692, 102 Pac. 772:

"Furthermore, we are of the opinion that the judgment may be sustained upon the ground that the sale of the land by the county treasurer to himself or a deputy in his office is against public policy, and therefore invalid. *Sponable v. Woodhouse*, 48 Kan. 173, 29 Pac. 394."

It may be further held that, while mere inadequacy of price is not ordinarily sufficient to avoid a judicial sale, yet when that circumstance can be coupled with other facts and these together work a fraud upon the owner of the property, it may operate as a controlling equity. *Roger v. Whitham*, *supra*. So in this case, the great difference between the true value and the price paid, when coupled with the act of the sheriff, warrants us in holding the sale to be void at the suit of the plaintiffs. The defendants were tendered what plaintiffs conceived to be the amount due to satisfy the lien for street assessments. The tender was refused, but they offer to do equity. Other taxes and expenses may have been met by the defendants since this suit was instituted. We will not, therefore, direct a final judgment, but affirm the holding of the lower court that the sale was void at the instance of the plaintiffs, and remand the case with direction to the trial judge to ascertain the amount of any taxes and charges justly due the defendants, and for which sum they are to have a lien upon the property if the amount is not paid within a time to be fixed in the judgment. *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264.

We notice that Mr. Kuster, who was the principal witness on behalf of defendants, when called upon to state the amount due upon the several lots with principal, interest, etc., figured interest at fifteen per cent upon the sum paid to satisfy the lien. This he cannot do. He may recover the legal rate of interest and no more. The rule announced in *Gould v. White*, 62 Wash. 406, 114 Pac. 159, controls. Costs to respondents on this appeal.

Gose, Parker, and Chadwick, JJ., concur.

[No. 10120. Department One. October 7, 1912.]

John Dougherty, *by his Guardian etc., Respondent*, v. C. H. Soll, *Appellant*.[1]

Appeal—Review—Findings. Upon a trial *de novo* in the supreme court, findings upon conflicting evidence will be set aside where the supreme court is convinced that the evidence preponderates in favor of the appellant and undisputed circumstances support his witnesses.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered October 30, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for malpractice. Reversed.

C. H. Graves and *Hathaway & Alston*, for appellant.

Edgar C. Snyder, for respondent.

Crow, J.—This action was commenced by Kate M. Dougherty, guardian *ad litem* for John Dougherty, her minor son, against C. H. Soll, a physician and surgeon, to recover damages resulting from malpractice. The cause was tried without a jury, and findings were made upon which judg-

[1]Reported in 126 Pac. 924.

ment was entered in plaintiff's favor. The defendant has appealed.

The complaint alleged that, on June 25, 1909, the respondent John Dougherty, then a minor about seventeen years of age, accidentally cut his left knee with an axe, and severed his patella or knee cap; that appellant, whom he employed as a physician and surgeon, did not discover the fact that the patella had been severed or injured; that he permitted it to remain in that condition without proper treatment; that a surgical operation became necessary and was finally performed on October 22, 1909, by a Seattle surgeon; that, as a result of appellant's failure to properly diagnose and treat the injury, respondent has been permanently crippled, and that appellant was guilty of malpractice. It is conceded that respondent's knee was cut by the axe on June 25, 1909; that appellant treated him; that he did not treat him for a severed or broken patella; and that on October 22, 1909, respondent did have a broken patella upon which a Seattle surgeon performed an operation.

The evidence shows that, about two weeks after respondent's injury, he began to walk without the aid of a cane or crutch; that on several occasions he was seen walking some distance from his home with a natural gait except that he limped slightly; that about August 23, 1909, he walked a quarter of a mile or more from his home over a country road to the house of a friend where he attended a party; that appellant saw him there; that respondent then told appellant he was "feeling fine"; that two days later respondent had a fall in which his knee was again injured; that after the second injury, he again called upon appellant who had not treated him for several weeks; that his knee was then swollen; that appellant applied remedies to reduce the swelling preliminary to further treatment; that after appellant had twice treated respondent for the second accident, respondent told appellant he was about to go to Seattle to attend school, and that he would consult a physician and surgeon there;

that appellant gave him a letter containing a history of the case; that respondent went to Seattle about September 2, 1909, where he called upon the Seattle surgeon, who at first gave him some simple treatment; that at the second consultation the Seattle surgeon decided the patella was fractured and would require an operation, and that he did operate on October 22, 1909.

Appellant insists that the patella was not severed or broken at the date of the first accident; that the fracture was caused by the second accident; that his treatment after such accident was skillful and proper; and that respondent is not entitled to any recovery. It seems to us that the vital question now before us is whether the patella was broken by the first or second accident. The trial judge found that it was severed by the stroke of the axe in June, 1909, a fact that appellant should have then discovered, but did not discover; that appellant failed to treat respondent skillfully and properly, and that he should respond in damages for malpractice. Ordinarily we are not inclined to disturb findings of a trial judge which have been made upon conflicting evidence. Yet this case is before us for trial *de novo*, and should we conclude that the evidence does not sustain the findings, it is our duty to make our own findings and direct the proper judgment.

We have examined the record with much care. It must be admitted that the evidence is conflicting, but we are convinced that it preponderates in favor of findings we now make, to the effect that the patella was not severed by the first accident; that appellant's treatment of the injury then sustained was skillful, proper, and successful; that under such treatment the respondent had well progressed towards a perfect recovery; that the patella was fractured by the second accident; and that at no time has appellant been guilty of negligence, unskillfulness or malpractice. We cannot enter upon a detailed discussion of the evidence, but will state that undisputed circumstances support these findings,

which are also supported by the evidence of a number of skillful surgeons, as well as other witnesses not experts.

The judgment is reversed, and the cause remanded with instructions to dismiss.

MOUNT, C. J., PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 10352. Department One. October 7, 1912.]

AMELIA SORTORE, *Respondent*, v. JAMES S. SORTORE, *Appellant*.[1]

DIVORCE—COMPLAINT—AMENDMENT. It is not error to allow a complaint for a divorce to be amended to set up a cause of action for the annulment of the marriage.

MARRIAGE—ANNULMENT. Under Rem. & Bal. Code, § 983, providing that when there is doubt as to the validity of a marriage either party may apply for a decree of nullity, a divorced woman who remarries within six months, while incapacitated, may maintain the action where she did not know that the marriage was illegal, and was less in the wrong than the husband, who knew the facts as to the divorce.

HUSBAND AND WIFE—VOID MARRIAGE—COMMUNITY PROPERTY. A marriage between parties prohibited from contracting the marriage is void *ab initio*, and property acquired cannot be community property.

MARRIAGE—ANNULMENT—DISPOSITION OF PROPERTY. Upon the annulment of a void marriage, it is not an abuse of discretion to award to the plaintiff property which belonged to her prior to marriage, and upon which she had paid all taxes, where the improvements placed thereon by the defendant added little to its value, and he was paid for the greater part of his work, and had abused the plaintiff and failed to properly provide for her.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered November 18, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for divorce. Affirmed.

[1]Reported in 126 Pac. 915.

Vince H. Faben, for appellant.

Higgins, Hall & Halverstadt (*Hyman Zettler*, of counsel), for respondent.

Crow, J.—The plaintiff and defendant were married at Victoria, British Columbia, on December 3, 1901. By her original complaint, plaintiff asked a decree of divorce. Against defendant's objection, she was permitted to file an amended complaint, in which she alleged that for many years she and one Lorenz Kratz were husband and wife; that on November 7, 1901, she obtained a decree of divorce from Lorenz Kratz, in the superior court of King county, which decree prohibited her from contracting marriage with any third party within six months from its date; that she was then informed and believed that her marriage to a third party without the state of Washington, valid where the ceremony was performed, would be valid in this state; that so believing, she and defendant went to Victoria, British Columbia, where they were married on December 3, 1901; that they immediately returned to this state; that she had no intention of evading the law of this state; that defendant knew of her decree of divorce from Lorenz Kratz, and the date of its entry; that at his solicitation and request plaintiff and defendant were married in Victoria; that the marriage then was, and still is, valid under the laws of British Columbia; that plaintiff then owned, and still owns, certain real estate in the city of Seattle; that defendant has failed to support plaintiff; that he has been guilty of habitual drunkenness and extreme cruelty; that plaintiff and defendant lived as husband and wife in this state from the date of their marriage until October 19, 1909; that when plaintiff commenced this action and asked a divorce, she did not inform her attorneys that she had been married to defendant within six months after the entry of her decree of divorce, and that she did not then know her marriage to defendant was void under the laws of this state.

Plaintiff, in her amended complaint, asked that a decree be entered annulling her marriage to defendant, adjudging the real estate to be her separate property, and awarding the same to her. Defendant by answer admitted the marriage at Victoria, B. C., on December 3, 1901, denied that he then knew plaintiff had been divorced for less than six months, denied any wrongful acts upon his part; alleged that the plaintiff represented to him that she had been divorced for more than six months; alleged that the marriage ceremony was performed in British Columbia at her instance and request, and further alleged that the record title to the real estate mentioned in the complaint stood in the name of plaintiff's daughter in trust for plaintiff; that it was agreed between plaintiff and defendant that after their marriage the real estate should be conveyed to the plaintiff; that defendant should improve it so as to increase the rental value; that it should thereupon become community property; that it was so conveyed to plaintiff after the marriage; that defendant expended large sums of money, and performed personal labor in its improvement, and that it is now the joint property of plaintiff and defendant. By the prayer of his answer, the defendant asked a dismissal of the amended complaint. The reply denied the affirmative allegations of the answer. The trial court made findings sustaining the allegations of the amended complaint, entered a decree annulling the marriage, and awarded the real estate to plaintiff. The defendant has appealed.

Without discussing the evidence, which is conflicting, we will state our conclusion that it sustains the findings of the trial judge, which will not be disturbed. Appellant insists that the trial court erred in permitting the respondent to file an amended complaint, changing the form of her action from one for divorce to one for annulment of the marriage, and that respondent cannot ask an annulment as she is the party whose incapacity invalidated the marriage under the laws of this state. We find no merit in these contentions. In *Buck-*

ley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. 900, we said:

"It is further contended by appellant Andrew Buckley that, inasmuch as Mary Buckley's complaint herein was one as in an action for divorce, while in her reply to appellant's answer she prayed for a decree of annulment of marriage, the latter prayer being granted by the court, there was such a variance as should prevent her from having any relief in this action. We do not think this contention is meritorious. 25 Cyc. 900; *Werner v. Werner, supra.*"

See, also, *Barth's Adm'r v. Barth*, 102 Ky. 56, 42 S. W. 1116, 80 Am. St. 335.

Not only was it proper to permit an amendment to the complaint, but under the evidence it was also proper to enter a decree of annulment on respondent's application, although her incapacity invalidated the marriage under the laws of this state. The evidence shows that respondent did not know her marriage to appellant, solemnized in Victoria within six months after the entry of her decree of divorce from Kratz, would be void in this state; that appellant did know she had been divorced for less than a month; that he did advise and induce her to have the ceremony performed in British Columbia; that they both believed such marriage, being valid in British Columbia, would be valid in this state, and that respondent, although the incapacitated party, was less in the wrong than appellant. Rem. & Bal. Code, § 983, provides that:

"When there is any doubt as to the facts rendering a marriage void, either party may apply for, and on proof obtain, a decree of nullity of marriage."

This section is explicit and sustains the decree. The fact that under Rem. & Bal. Code, § 991, and the ruling thereon in *State v. Fenn*, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800, the marriage was void in this state, is no reason why a decree annulling the marriage, declaring it void, and adjudicating the status of the parties should not be entered.

"If a marriage is void, strictly no proceedings are necessary, since the invalidity of such a marriage may be relied upon in any court and in any proceedings between any parties, whether the question is directly or collaterally in question. *Emerson v. Shaw*, 56 N. H. 418, 420; *Mountholly v. Andover*, 11 Vt. 226, 34 Am. Dec. 685; Bish. Mar. & Div. § 46. But the fact that the marriage was known to be void did not take away the power of the ecclesiastical court in England to declare it invalid. *Andrews v. Ross*, L. R. 14 P. D. 15, 16, and cases cited. Although there may be no doubt in the minds of the parties, 'yet,' practically, it is often of the very highest importance, both to individuals and to the community, that there should be a judicial adjudication in reference to a void marriage, for then the question of the *status* of the parties and their children is put at rest, while the witnesses are alive; and the former are justified, in the eyes of the community, in entering into a second marriage.' Bish. Mar. & Div. § 262; Stew. Mar. & Div. §§ 50, 139, 140, 143; 2 Kent 76; *Pingree v. Goodrich*, 41 Vt. 47, 49; *Rawson v. Rawson*, 156 Mass. 578, 580; *Wightman v. Wightman*, 4 Johns. Ch. 343, 345; *Patterson v. Gaines*, 6 How. 550, 592." *Bickford v. Bickford*, 74 N. H. 448, 69 Atl. 579.

A decree annulling a void marriage may be entered in an action in which a divorce has been asked. 26 Cyc. 900; *Lynch v. Lynch* (R. I.), 83 Atl. 83.

Appellant further contends that, in awarding the real estate to respondent, the trial judge made an unjust and inequitable distribution. The marriage between appellant and respondent has been nullified for the reason that it was void *ab initio* and, as a matter of course, there could be no community property. *In re Sloan's Estate*, 50 Wash. 86, 96 Pac. 684, 17 L. R. A. (N. S.) 960. Prior to the invalid marriage, the real estate belonged to respondent. Keeping pace with the rapid growth of the city of Seattle, it has enhanced in value. Appellant did certain work towards its improvement, but was compensated by respondent for the greater portion of his work and materials which he furnished. She paid all taxes, special assessments and insurance charges. Credible evidence in the record shows that

improvements now on the property, including those made by appellant, add little or nothing to its value; that the principal value is in the land itself irrespective of the improvements. The alleged agreement relative to the real estate, pleaded in the answer and claimed by appellant, was not sustained by the evidence. The evidence does show that appellant has been guilty of habitual drunkenness; that he violently abused and mistreated respondent; that she was compelled to leave him; and that he did not provide for her as he should have done. Under the circumstances and facts thus shown, we are unable to conclude that the trial judge abused his discretion in the disposition of the property. On the contrary, we are satisfied that justice has been done.

The judgment is affirmed.

PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 10423. Department One. October 7, 1912.]

RASMUS KONNERUP *et al.*, *Respondents*, v. FRANK C. MILSPAUGH *et al.*, *Appellants*.[1]

JUDGMENT—LIEN—WHEN ATTACHES—PRIORITY OVER SUBSEQUENT CONVEYANCES. The lien of a judgment attaches from the date of entry, notwithstanding the pendency of a motion for a new trial; and the lien cannot thereafter be impaired by a voluntary conveyance by the judgment debtors, nor the title acquired under execution sale questioned by vendees of the judgment creditors who had notice of the judgment and failed to redeem.

EVIDENCE—PAROL EVIDENCE — DEEDS — DESCRIPTION — IDENTIFICATION OF PROPERTY—BONA FIDE PURCHASERS. It is admissible to show by parol, to aid in the description of "Block 95, Edmonds" in a sheriff's deed, and to identify the property, that the "Plat of Edmonds" had no block 95, while there was such a block in the "Plat of the City of Edmonds," and no other block of that number within the corporate limits; and such description is sufficient to put *bona fide* purchasers upon inquiry.

[1]Reported in 126 Pac. 939.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered February 28, 1912, in favor of the plaintiffs, upon an agreed statement of facts, in an action of ejectment. Affirmed.

S. J. White, for appellants.

Robert Mulvihill and *Gordon D. Eveland*, for respondents.

Crow, J.—This action was commenced by Rasmus Konnerup and Anna Konnerup, his wife, against Frank C. Milspaugh, Millie Milspaugh, his wife, Bert Ernst and Cora Ernst, his wife, to recover possession of real estate. From a judgment in plaintiffs' favor, the defendants Milspaugh and wife have appealed.

The action was tried upon an agreed statement of facts as shown by a written stipulation filed herein, material portions of which read as follows:

"2nd. That on the 28th day of June, 1909, plaintiffs recovered judgment against Thomas Egers and Laura Egers, his wife, and Bert Ernst and Cora Ernst, his wife, in their favor, in the sum of one thousand and ninety dollars ($1090) and costs of suit, and the same was entered in the records of the above entitled court, by which the same was rendered, on the 30th day of June, 1909; that within the time limited by law, the said Thomas Egers and Laura Egers, his wife, and Bert Ernst and Cora Ernst, his wife, moved the court for a new trial, . . . that on the 5th day of March, 1910, said motion for a new trial came regularly on for hearing in the above entitled court, and was denied by said court; that no appeal has ever been taken in said cause; that thereafter on the 6th day of June, 1910, an execution was duly issued out of said court in said cause, in pursuance of which execution the sheriff of Snohomish county, Washington, levied upon the following described property supposed to be situated in said county, to wit: Lots thirty-three (33), thirty-four (34), thirty-five (35), thirty-six (36), thirty-seven (37), in block ninety-five (95), of Edmonds; that this description appears in the levy of the sheriff returned into court, and the deed hereinafter referred to, and that no other description is given; that said

property was levied upon as the property of the defendants in said action; that thereafter, and on the 23rd day of July, 1910, after due and proper notice, as required by law, the said sheriff sold the said described property to the plaintiff herein Rasmus Konnerup, for the sum of $300, and which sale was, on the 6th day of August, 1910, duly confirmed by the above entitled court; that thereafter, and on the —— day of July, 1911, said property not having been redeemed from the said sale, the said sheriff made, executed and delivered to plaintiff, Rasmus Konnerup, a sheriff's deed for said described property.

"3rd. That, on the day of rendition of said judgment and until the 17th day of November, 1910, said defendants Bert Ernst and Cora Ernst, his wife, were legal owners of the following described property, to wit: Lots thirty-three (33), thirty-four (34), thirty-five (35), thirty-six (36), and thirty-seven (37) of block ninety-five (95), plat of the city of Edmonds, as the same appears of record in the office of the auditor of said Snohomish county, Washington, in which county said real estate is situate; that on said last named date, the said defendants, Bert Ernst and wife, in consideration of the sum of $1400 cash in hand paid, made, executed and delivered to defendants, Milspaugh and wife, their certain warranty deed, conveying to said defendants all their right, title and interest in and to said real property, and that said deed was, on the —— day of November, 1911, duly recorded in the office of the auditor of said county, and the grantees therein immediately went into possession of the same, and have ever since been, and now are, in possession of the whole thereof.

"4th. It is also agreed that, if the evidence is admissible as against defendants, Milspaugh and wife, there are two main plats in the city of Edmonds, and within its corporate limits, to wit, the 'Plat of Edmonds,' and the 'Plat of the City of Edmonds,' which are the official names thereof, and which are duly recorded as required by law; that there is no block 'ninety-five (95)' in the 'Plat of Edmonds,' but that there is such a block in the 'Plat of the City of Edmonds,' and further, that there is no other block ninety-five within the corporate limits of said city; and further, that block ninety-five (95) of Edmonds is by the people living in that vicinity understood to be and mean block ninety-five (95) of the plat

of the city of Edmonds as the same is recorded in the office of the auditor of Snohomish county, Washington; that it was the intention of said sheriff to levy upon the lots in block ninety-five in the last named plat; that defendants, Milspaugh and wife, object to the introduction of this evidence on the ground that the same is irrelevant, immaterial and incompetent, in that parol evidence, by which it is agreed this only could be proved, cannot be introduced to identify property sold and conveyed under a judicial sale, or to add to a description given in a sheriff's deed, and that such description must be sufficient in itself to identify the property without the aid of extrinsic aid or proof. If this objection is not good in law, and should be overruled by the court, then it is agreed that such facts are proved for the purpose of this trial."

Respondents pleaded their title acquired under the judgment execution sale and the sheriff's deed, and as to the claim and possession of the appellants Milspaugh alleged:

"That said Bert Ernst and Cora Ernst, his wife, assumed to transfer to the defendant Frank C. Milspaugh the above described real property, by a deed dated the 17th day of November, 1909, and filed for record, in the office of the auditor of Snohomish county, Washington, on the 26th day of November, 1909; that said deed so executed by said Bert Ernst and Cora Ernst, his wife, to said Frank C. Milspaugh was, at the time of its execution inferior to the lien of the judgment of the plaintiff, Rasmus Konnerup, hereinbefore described, and as against said plaintiffs is null and void.

"That said defendants, Frank C. Milspaugh and Jane Doe Milspaugh, are now wrongfully in possession of said premises and wrongfully claim a right thereto, and, although often requested, have refused and still refuse to deliver up said premises to said plaintiffs."

There is an apparent discrepancy between the complaint and the stipulation as to the date of the deed from Ernst and wife to Frank C. Milspaugh. The former alleges that it was executed on November 17, 1909, while the latter stipulates that it was executed on November 17, 1910, which

would be after the execution sale. We accept the date stated in the stipulation, although the discrepancy is not material.

Appellants contend that this is an action to set aside the deed from Ernst and wife to the appellant Frank C. Milspaugh, on the theory that it was fraudulent and void; that the complaint and stipulated evidence in support thereof are insufficient to sustain the judgment, as they fail to allege or show that the judgment debtors were insolvent; that they had no other property to satisfy the judgment, or that an execution had been issued upon the judgment and returned *nulla bona*. In support of their position they cite *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. 56, 15 L. R. A. 784; *Hamilton Brown Shoe Co. v. Adams*, 5 Wash. 333, 32 Pac. 92; *Samuel v. Kittenger*, 6 Wash. 261, 33 Pac. 509; *Howard v. Devol*, 15 Wash. 270, 46 Pac. 235; *Allen v. Chambers*, 18 Wash. 341, 51 Pac. 478; *McAvoy v. Jennings*, 44 Wash. 79, 87 Pac. 53. Although respondents, in the prayer of their complaint, ask that the deed from Ernst and wife to the appellant Frank C. Milspaugh be declared null and void and be canceled, it is apparent that the action based upon respondents' title acquired under the execution sale is one to recover possession. At the date of the entry of the judgment, Ernst and wife owned the real estate and held the record title thereto. Respondents therefore acquired and held a valid lien on the real estate from and after the entry of the judgment, although under § 431, Rem. & Bal. Code, execution could not issue until the motion for a new trial had been denied. The cases which appellants cite are not pertinent to the facts here shown, as in none of those cases did it appear that the debtors held the record title to the real estate at or subsequent to the date of the entry of the judgment. But it did appear that they had conveyed the record title to third parties prior to the entry of judgment or the levy of an attachment. Under the facts here presented, it appears that a valid judgment lien attached to the real estate while the judgment debtors held the record

title. Respondents' right as judgment creditors to enforce that lien by execution and sale was not thereafter impaired or destroyed by the judgment debtors voluntary conveyance to Frank C. Milspaugh, even though such conveyance was made for a valuable consideration and in good faith. Milspaugh took title subject to respondents' lien and acquired no greater rights than the judgment debtors had.

"Where the lien of a judgment has once attached to land, it cannot be divested by any voluntary alienation of the property by the owner; but a purchaser from the judgment debtor who has actual or constructive notice of the judgment lien will take the estate charged therewith, to the extent of the amount of the judgment as recorded at the time of his purchase, . . . it is not in the power of the judgment debtor to defeat or displace the judgment lien by conveying or mortgaging the land, or repudiating the title or attorning to a third person." 23 Cyc. 1391, 1392.

Having purchased subject to, and with notice of, the judgment lien, and having failed to protect themselves by redemption from the execution sale, appellants cannot at this time question respondents' title acquired under the sheriff's deed.

Appellants further contend that the trial judge erred in overruling their objection to the introduction of parol evidence (as set forth in the stipulation) in aid of the description written in the sheriff's deed. They insist that the description is insufficient; that it is not legal; that "Block 95 Edmonds" is not a subdivision known to the law, and that it does not refer to any other source of knowledge by which it can be explained. We find no substantial merit in these contentions. The description is clear. It would seem that, under the facts shown, no person of ordinary intelligence could be misled by it or would be unable to locate and identify the property conveyed. In *Ontario Land Co. v. Yordy*, 44 Wash. 239, 87 Pac. 257, this court in discussing the sufficiency of a description, said:

"It is a well-established principle of law that a description in a deed, or other instrument affecting title to real estate, is sufficient if it affords an intelligent means for identifying the property, and does not mislead. In other words, if a person of ordinary intelligence and understanding can successfully use the description in an attempt to locate and identify the particular property sought to be conveyed, the description answers its purpose and must be held sufficient. Mr. Jones, at section 323 of his treatise on the Law of Real Property in Conveyancing, says: 'The first requisite of an adequate description is that the land shall be identified with reasonable certainty, but the degree of certainty required is always qualified by the application of the rule that that is certain which can be made certain. A deed will not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it was intended to convey. The office of a description is not to identify the land, but to furnish the means of identification. The description will be liberally construed to afford the basis of a valid grant. It is only when it remains a matter of conjecture what property was intended to be conveyed, after resorting to such extrinsic evidence as is admissible, that the deed will be held void for uncertainty in the description of parcels.'"

Extrinsic evidence in aid of the description was competent and admissible to identify the property. It is manifest that the lots sold were in the city of Edmonds, and that there is only one block 95 within the territorial limits of that municipality. There can be no question as to the identity of the lots sold under the execution and conveyed by the sheriff's deed.

The judgment is affirmed.

Mount, C. J., Parker, Chadwick, and Gose, JJ., concur.

[No. 10351. Department Two. October 7, 1912.]

FRANK D. ALLEN *et al.*, *Appellants*, v. BRITTA ROSEBERG, *Respondent*.[1]

WATERS AND WATER COURSES — IRRIGATION — ADVERSE POSSESSION. Where a dispute arose as to the absolute right to use for irrigation the waters of a creek, and the parties agreed to divided the water half and half, and acted thereon, uninterrupted use of one-half of the water under the agreement for the period of 19 years ripens into title thereto by adverse possession, even as against a prior appropriation; and it is immaterial that such adverse use was by a lower proprietor, the agreement being a distinct recognition of his claim and fixing the extent of it.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered November 20, 1911, in favor of the defendant, after a trial on the merits before the court, dismissing an action to enjoin interference with the waters of a stream. Reversed.

Short & Gleysteen and *Hovey & Hale*, for appellants.

Pruyn & Hoeffler, for respondent.

ELLIS, J.—This action was brought to enjoin the defendants from interfering with the plaintiffs' use of water, from what is called in the record "Dry Creek," in Kittitas county. The defendant Britta Roseberg answered, claiming ownership of the water under an alleged prior appropriation by one Preston, her predecessor in interest. The other defendants disclaimed any interest in the water. The plaintiffs Frankland and wife were tenants of the plaintiffs Allen. A trial was had, and the court entered a decree in favor of the defendant, Britta Roseberg, and dismissing the action. The plaintiffs Allen and wife have appealed.

The material facts developed by the evidence are as follows: In May, 1880, one Preston settled upon unsurveyed land which, when afterwards surveyed, constituted the north-

[1]Reported in 126 Pac. 900.

west quarter of section 2, township 19, north, range 15, E., W. M. After the survey, he filed his preemption thereon, made final proof, and received patent therefor. This and the other lands involved are arid and require irrigation for profitable farming. He testified that, in June, 1880, he went about a mile from his settlement to a point near the southwest corner of what since the survey constitutes section 3, township 19, north, range 15, E., W. M., and is included in the Northern Pacific Railroad grant; that he diverted a perennial stream flowing across the south part of sections 3 and 2, by digging a ditch in a northerly direction some 300 or 400 yards, thus turning all of the water of the stream into a natural depression running to the northwesterly part of section 2. He claims to have used practically all of this water during the irrigating season to irrigate his land each year, till 1885. His enclosure included a few acres of the northeast quarter of section 3, which he also irrigated from this stream. No other witness testified to this diversion, or ever knew of the stream running anywhere except as at present. Several witnesses testified that there was no sign of an old bed or other evidence of such change. At a point a short distance southwest of the southeast corner of section 34, township 20, north, range 15, E., W. M., which is also the northwest corner of section 2 and the northeast corner of section 3 above mentioned, the stream divided into two branches, the northerly branch flowing across the southeast corner of section 34, and the southerly branch in an easterly direction onto the northwest quarter of section 2.

In 1885 Preston sold his land to one Oliver. In March, 1885, one Taylor filed a preemption claim upon the southeast quarter of section 34, township 20, north, range 15, E., W. M., and obtained a patent therefor in 1891. He resided on this land continuously from March or April, 1885, till March, 1910, about six months after he had sold it to the appellant Allen in the fall of 1909. Taylor, in April, 1885, appropriated the water of the north branch of the stream, and

used it to irrigate his land in the southeast quarter of section 34. He testified that he was then assured by Preston, then owner of the northwest quarter of section 2, that he—Preston—made no claim to the water of this north branch. Taylor's brother corroborated him in this. Preston admitted this, but testified that the north branch then carried only the surplus water of the stream at high stages, the south branch carrying practically all of the water at the low stages when it was needed for irrigation. The point at which Taylor diverted the water was at or shortly below the forks of the stream. He used this water without interference from any one, every season for four years. In 1890 John Roseberg, then husband of the respondent, and one Peterson, who were in possession of the northwest quarter of section 2 as tenants of Oliver, Preston's grantee, began interfering with Taylor's use of the water, and in 1891 Roseberg, who then held a contract to purchase the land from Oliver, continued the interference, until a physical encounter took place in which Roseberg used a club and Taylor a revolver, Roseberg receiving a slight wound. The neighbors interceded, and the parties were induced to enter into an agreement through arbitrators, dividing the water of the stream into equal parts at the forks by a measuring box, Taylor taking the water in the north branch and Roseberg that in the south branch. The agreement, which was drawn by one of the neighbors, reads as follows:

"This contract of agreement, made this 29th day of May, 1891, by and between John Roseberg, party of the first part, and Edward J. Taylor, party of the second part, both of Cle Elum, Kittitas Co., State of Washington.

"In section 3, township 19, range 15, east, county of Kittitas, state of Washington, on the stream known as Dry creek, we agree to put in a new head gate in the same place as the old one is now, and to divide the water in the same place, and each party to receive one-half of the water of said Dry creek.

"Description of head gate: A box shall be placed on a level which shall be 12 feet long, 2 feet wide, and one foot

deep, the water is to be divided with a V 6 inches wide, 4 ft. in length, and one foot in height, said V to be placed 8 ft. from the west end of said box. And we do both agree that a ditch shall be dug as follows: Beginning 10 ft. west from the west end of said box, and said ditch to run due south for a distance of about 50 rods, or to the high ground across the swamp, and said ditch shall be 20 inches wide in the bottom, and 30 inches wide on top, and 18 inches deep.

"And the party of the first part and the party of the second part do further agree that each party shall pay one-half of the expense in digging said ditch. And the parties herein mentioned do agree that said ditch shall be complete on or before the first day of May, 1892. And the party of the second part shall dig his ditch in a northerly direction to his place, and said ditch shall be dug as near straight from the head gate as practicable.

"And we further agree that all expense in the keeping in repair of said box at head gate, and on the ditch running south, and also on cleaning out of old channel shall be paid jointly. (Duly witnessed.) John Roseberg,

"Edward J. Taylor."

John Roseberg never completed his purchase from Oliver, but made a contract to purchase some of the railroad land in the northeast quarter of section 3. He died and his widow, the respondent, made a new contract to purchase the same land, and in February, 1903, the railroad company conveyed the land to her. She has resided there ever since. The evidence shows that she knew of Taylor's use of the water ever since the making of the agreement with her husband, and that the measuring box at the point of division has been renewed, her son helping Taylor in that work. Taylor used his one-half of the water under the agreement continuously, in irrigating his land each season from May, 1891, till 1910, with her knowledge and acquiescence. Respondent also now owns some of the land in section 2 formerly owned by Preston, and has used half of the water in irrigating this and her land in section 3. When the appellants Allen took possession of the Taylor land, the respondent again made a claim to all of the

water, and began using it, and in 1911 the appellants brought this action.

We are of the opinion that, under the evidence, the appellants are entitled to one-half of the water of the stream in question, by reason of the agreement between their grantor and John Roseberg, and his continuous use of the water as appurtenant to their land for a period of nineteen years. It can hardly be questioned that Taylor began using water from this stream in 1885 without any objection from Preston, the only person then adversely interested, and that he continued this use for four years without his right being questioned. When the dispute arose between him and Roseberg, he was claiming, not a mere license, but an absolute right to use the water. The agreement of May 29, 1891, between them shows upon its face that it was intended as a final settlement of this dispute. The respondent did not sign the agreement, but the evidence is conclusive that she must have known of it, and it is undisputed that she acquiesced in its observance from its date until 1910. Whatever might have been the relative rights of the parties prior to this agreement, it certainly formed a sufficient basis for an adverse possession and use by Taylor of half the water after that time. That his use thereafter was adverse, under a claim of right, and not merely permissive, is beyond question. Assuming that Preston had made a prior appropriation of all of the water, Taylor's right to half of it had ripened into a complete title when the appellants purchased from him. Title to water can be obtained by adverse possession for the statutory period, even as against a prior appropriation. 3 Farnham, Waters and Water Rights, § 680; *Farwell v. Brisson*, 66 Wash. 305, 119 Pac. 814; *Oregon Construction Co. v. Allen Ditch Co.*, 41 Ore. 209, 69 Pac. 455, 93 Am. St. 701, and notes.

The respondent contends that there can be no adverse use by a lower proprietor as against those above, since the use below is no interference with, and hence no possible invasion

of, the rights of the upper owner, citing Weil on Water Rights (3d ed.), p. 635, and other authorities. It is no doubt true that a lower use is, as a general rule, in its very nature not adverse. But this rule is applicable in its full sense only as between upper and lower riparian proprietors, and only where the lower use does not interfere with the upper. Such is obviously not the case before us in any view of the facts. If, as respondent claims, her rights date back to Preston's alleged diversion of the stream a mile away from his land, then prior to that diversion the land of neither party was riparian to the stream, and Taylor's use was of water already diverted, and was necessarily an interference with its use by Preston and his grantees. The rival claims were not between upper and lower riparian owners. If, on the other hand, the stream had always been where it was in 1885 (and it must be admitted that the evidence strongly suggests that theory), then both parties were riparian, the one to the north branch and the other to the south, and there was no evidence to show that the diversion of the water by Taylor was not above that by Preston and his successors. Both seem to have taken the water out at or below the forks. In either case it is plain that the use by Taylor was an interference with the use by the respondent's predecessors, and hence was capable of being an adverse use. It was so adverse as to lead to a physical conflict, and was recognized as adverse by the agreement to divide the water by arbitration. The respondent knew of its adverse nature then, and there is nothing in the agreement changing the nature of Taylor's claim. On the contrary, the agreement was a distinct recognition of his claim and fixed its extent. Under the evidence the appellants are entitled to the use of one-half, but only one-half, of the water of the stream without interference.

The judgment is reversed, with direction that the injunction issue accordingly.

MOUNT, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 10739. *En Banc.* October 9, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Otto A. Case, Auditor etc., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *George A. Joiner, Judge, Respondent.*[1]

ELECTIONS—PRIMARY ELECTIONS—RETURNS — DUTY TO CANVASS—PREPARATION OF BALLOTS—WHO MAY QUESTION—INTEREST OF AUDITOR. The county auditor, charged with the duty of printing on the election ballots separately the names of judicial candidates who received a majority of all votes cast, has no such interest in the matter as to entitle him to maintain an action to secure a count of the total number of ballots cast, without which such majority candidates could not be determined, where the canvassing board failed to determine the question; since his duty as auditor is ministerial and limited to printing such names separately as affirmatively appear from the records of the canvassing board, on file in his office, to have received a majority of all the votes cast; such returns being conclusive on him in the absence of a proceeding in behalf of any interested party.

Certiorari to review a judgment of the superior court for King county, Joiner, J., entered September 25, 1912, upon sustaining a demurrer to the petition, in an action seeking an order of court to compel election officers to make return of the ballots cast for candidates at a primary election. Affirmed.

John F. Murphy and *Robert H. Evans*, for relator.

John E. Humphries, John T. Casey, James Lawler, L. Frank Brown, and *Carl J. Smith*, for respondent.

PARKER, J.—On September 18, 1912, this relator commenced an action in the superior court for King county, entitled, The State of Washington on the relation of Otto A. Case as auditor of King county, Washington, plaintiff, v. John E. Humphries, Carl J. Smith, James T. Lawler, John T. Casey, L. Frank Brown, et al. In his petition and affidavit upon which he rested his right to the relief prayed for in that action, he alleged the following:

[1]Reported in 126 Pac. 937.

"(1) That the relator is the duly elected, qualified and acting auditor of King county, state of Washington.

"(2) That on the 10th day of September, 1912, pursuant to the provisions of the direct primary law, an election was held in King county for the purpose, among other things, of nominating candidates for judge of the superior court of said King county. That nine of said judges were to be nominated under the provisions of said primary election act.

"(3) That the defendants, John E. Humphries, Carl J. Smith, James T. Lawler, John T. Casey, L. Frank Brown . . . . . (naming 23 others), and each of them, filed their application with relator as the auditor of King county, Washington, and became candidates for nomination to fill said position as judges of said court.

"(4) That said primary election was held for the purpose of making said nominations on the said 10th day of September, 1912, but in counting said ballots the judges and inspectors of said election in the several precincts of King county, failed to make return of the total number of ballots cast in each of said several precincts for said candidates for superior court judge, although said election officers properly counted the number of votes cast at said election in said precincts for each of said candidates separately. Through the failure of said election officials to make return of the total number of the votes cast for all candidates at said election, it is impossible for relator, as auditor of King county, to properly certify the names of said candidates, if any there are, who received a majority of all the ballots cast at said election for said position.

"(5) That under and pursuant to the provisions of chapter 101, Session Laws of 1911, it is and becomes the duty of relator to certify to such majority nominations, and to place same upon said ballot for the election to be held in King county on the 5th day of November, 1912, for said office.

"(6) That an emergency exists and relator should be permitted under the direction and supervision of the court, to proceed to count said ballots and determine who, if any among said defendants, as candidates for said position on the superior bench of said King county, are entitled to be placed upon said ballot as majority nominees, as same are defined by law.

"Wherefore, relator prays for an order of this court citing and commanding all of said defendants to appear and show cause before this court, if any they have, why said boxes should not be opened and the total number of legal ballots cast at said election for judicial candidates be ascertained, permitting relator to fulfill and discharge his statutory duties as fixed by law."

An order was issued by the superior court upon this petition, directed to the defendants, requiring them to show cause why an order should not be made as prayed for by the relator, when the defendants above named demurred to the petition upon the ground, among others, that the facts therein stated are not sufficient to constitute a cause of action. None of the other defendants made any contention before the trial court. After hearing the argument of counsel in behalf of the defendants above named, the court sustained the demurrer, when the relator electing to stand upon his petition and not plead further, judgment dismissing the action was rendered against him. Thereupon the relator caused the record of the proceedings had in the superior court to be brought here by writ of certiorari, and now prays for a reversal of the order and judgment of that court.

The argument of counsel for the relator proceeds upon the theory that it is impossible for him to determine from the returns certified by the several precinct primary election officials, who, if any, of the candidates received a majority of the votes cast at the primary election for judge of the superior court for King county, and that this renders it impossible for him to properly direct the printing of the names of such majority candidates, if there be any, upon the general election ballots separately, as provided by the laws of 1911, page 489, relating to the nomination of superior and supreme court judges, as follows:

"When there are to be elected at any general election one or more judges of the supreme court, or of the superior court of any county, the candidates for each respective office whose names are to be placed on the general election ticket shall be

determined as follows: The number of candidates equaling the number of judicial positions to be filled who receive the highest number of votes at the primary election, and an equal number of candidates for such positions, providing there are such candidates, who receive the next highest number of votes, shall be the candidates for such respective offices and their names shall appear on the general election ballot under the designation of such respective offices: *Provided, however*, That where any candidate for any such office shall receive a majority of all votes cast at such primary election for such office, the name or names of such candidates receiving such majority shall be printed separately on the general election ballot, under the designation 'Vote for ————————,' and the name or names of no opposing candidate or candidates shall be printed on such ballot in opposition to such candidate or candidates, but spaces equalling the number of such majority candidates shall be left following such name or names, in which the voter may insert the name of any person for whom he wishes to cast his ballot."

In view of the fact that there are nine judges of the superior court for King county to be elected at the approaching general election to be held in November, and that the returns of the primary election failed to show the number of ballots cast at that election, it seems clear that counsel's theory that it is impossible to determine from such returns who, if any, of the candidates chosen at the primary election were majority candidates, is correct. It does not follow, however, that the relator, as auditor for King county (and he is here in no other capacity), has any right or authority to determine the question of who, if any, of the candidates chosen at the primary election are majority candidates. The relator seems to assume that, since the county canvassing board has left undetermined, because of defective primary election returns, the question of who, if any, of the candidates are majority candidates, the duty devolves upon him to determine that question by counting the ballots, which was evidently not done by the county canvassing board, or that the duty devolves upon him to prosecute a proceeding

in the superior court with a view to having that court direct him to determine that question by counting the ballots under its supervision.

Reference to the statutes which provide for the canvassing of the primary election returns we think will render it plain that the relator has nothing to do with the determination of the question of who are majority candidates, except as he may assist in the determination of that question while a member of the county canvassing board. Section 4828, Rem. & Bal. Code, relating to the canvassing of primary election returns, provides:

"The vote for all county, city and municipal officers shall be canvassed and the returns made by the same officers and in the same manner as returns of the votes cast at general elections are by law now required to be made. Such canvassing board and other officers canvassing votes cast at such primary elections shall file with the proper officer a statement and report of such canvass which statement and report of said primary election shall contain:

"First: A statement duly certified to containing the names of all candidates voted for at the primary election with the number of votes received, and also the number of first choice votes received by each and the number of second choice votes received by each and the total number of votes received by each and for what office, said statement to be made as to each political party separately.

"Second: A statement of the names of the persons or candidates, of each political party who are nominated as hereinbefore provided. Where there is more than one person to be elected to a given office at the ensuing election, there shall be included in said statement of nominations the names of so many candidates for said office, nominated under the provisions of this act, as there are persons to be elected to said office at the ensuing election. Said statement shall, in like manner, be made separately as to each political party.

"Third: A statement of the whole number of electors registered and the number of ballots cast at said primary election."

Referring now to the general election law, we find that § 4932, Rem. & Bal. Code, provides that:

"The county auditor, chairman of the board of county commissioners and prosecuting attorney shall be the county canvassing board of election returns for all special and general county and state elections in each county."

These sections render it plain that the question here sought to be determined at the instance of the relator is to be determined by the county canvassing board, except only in so far as the auditor is to make the computation from facts determined and certified by the canvassing board, as provided by § 4828 above quoted. While he, by virtue of his office of county auditor, is a member of that board, he has no right or power to participate in the determination of the facts required to be determined and certified by the board, save as a member of that board. When it comes to the direction of the printing of the ballots for the general election, his duties are as separate and distinct from those of the canvassing board as if he had never been a member of that board. In the performance of the latter duty he is simply a ministerial officer; and in the performance of his duty of directing the printing of the ballots, he is to proceed solely upon the information furnished by the record of the canvassing of the returns of the primary election, of which he is merely the official custodian by virtue of such record being in his office. Before he can direct the printing of any majority candidates' names separately upon the election ballots, as provided by the act of 1911 above quoted, it must affirmatively appear from the record of the canvass of the primary election in his office that there are in fact such majority candidates; and in the absence of such fact affirmatively so appearing from the record of such canvass, he must proceed upon the assumption that there are no such majority candidates. We regard it as wholly immaterial to him in his official capacity (and we have seen that he is here in none other) whether there are in fact any such can-

didates or not, except as such fact may affirmatively appear from the record and certificate of the canvass made by the county canvassing board.

If this were a contest prosecuted by some candidate claiming to be a majority candidate, with the right of having his name printed on the official general election ballots separately, as provided by the act of 1911; or if this were a proceeding instituted by the canvassing board, which is charged with the duty of determining the question here involved, asking permission to open the ballot boxes and count the ballots because of the defective returns certified by the precinct election officers; or if this were a proceeding prosecuted by an elector, as such, claiming that one or more of the candidates were majority candidates; we would have a different question presented. We express no opinion as to just what right either of these would have to prosecute such a proceeding; but we are quite clear that the relator simply as county auditor has no such interest in having this question determined in the manner here sought as entitles him to prosecute this action. The record of the canvassing of the primary election returns being on file in his office, and it failing to affirmatively show that any candidate is in fact a majority candidate, it seems to us that, except he be required to certify differently by a court of competent jurisdiction, at the instance of some one whose rights may be affected by a wrong determination of that question, other than himself, his duty is plain; and that he should proceed upon the theory that there are no majority candidates.

We are of the opinion that the superior court correctly disposed of the cause, and its judgment is therefore affirmed.

MOUNT, C. J., ELLIS, CHADWICK, CROW, and GOSE, JJ., concur.

MAIN, J., took no part.

[No. 10069. Department One. October 10, 1912.]

W. L. Hale *et al.*, *Respondents*, v. Joe Ball *et al.*, *Appellants*.[1]

Boundaries—Location of Corner—Evidence—Sufficiency. The evidence sufficiently shows that a quarter corner was not located on a straight line between the section corners, where a witness testified that he found and identified the original stake out of a true line, which was corroborated by the fact that a line fence was constructed to it by defendant, and the inclosure was farmed for twelve years by others, without objection by defendant, or any effort on his part to correct the alleged mistake, although the land was being bought and sold.

Boundaries—Lost Corners—Establishment. An obliterated corner must be restored at its original location if ascertained by competent evidence.

Same — Right to Commission — Evidence of Location — Sufficiency. The court will not appoint a commission to establish a lost corner, under Rem. & Bal. Code, §§ 947-999, merely because the stake was obliterated; and where the corner was not lost or uncertain eighteen years before, at which time a fence was built to it, and nothing had since been done to question the location, the court cannot say that the corner is lost; since evidence of its location was not overcome by better evidence.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered May 3, 1911, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Merritt, Oswald & Merritt, for appellants.

Martin & Wilson, for respondents.

Crow, J.—In December, 1892, the defendant Joe Ball, the owner of section 9, township 22, north, range 36, east, Willamette Meridian, dug post holes for a fence across and along the north side of said section. The country there-

[1]Reported in 126 Pac. 942.

about was open and unfenced, and the northeast corner of section 9 was marked by the original government monuments, and the northwest corner of the section was also marked by a stone which has been accepted as the true section corner. When digging the post holes, he claims that he found that he was off the true line, and made an angle to reach the northeast corner of the section. He claims that he did not find the quarter section corner on the north side of the section. He explains the fact that he was off a true line extended from the northeast to the northwest corner of section 9 by the fact that the day was foggy and he could not keep the course in view. He set the posts and strung the wire in the spring of 1898. At that time and for some time thereafter, section 4, immediately to the north, was open and unoccupied land. His testimony shows that when a settler, Charles Cameron, settled on section 4, it was understood between them, Cameron being a nephew, that the fence was not on the true line and that, when it needed repair, they would change it. On the other hand, a witness who had settled in that vicinity in 1880 and on section 8 prior to the coming of Ball, testified as follows:

"Q. Did you ever have an occasion to examine the quarter section line or quarter section stake half way between the east and west side of sections 9 and 4, the line that separates these two sections? A. Yes, sir. . . . Q. Did you ever have an occasion at about that time or any time prior thereto to make a close examination of this quarter section corner I mentioned? A. Yes, sir. Q. Tell the court what you found there. A. Well, I found the quarter stake. Q. Do you know whether or not the fence ran through this quarter section corner? A. I always judged that it did; we knew that there was a crook there. Q. Did you ever assist in running these lines? A. I did. Q. What corners in reference to section 9 did you find? A. We started in on the west corner of 9 and set a stake at the quarter stake in the center, and then run from that to the east corner of 10—between 10, 9 and 4. Q. Then what did you do? A. Well, we surveyed 9. We went around 9 to see how things were,

just run around it. A man hired a fellow to survey it; was going to buy it before Ball got it. Q. At that time, did you find the 4 corners of section 9? A. Yes, sir. Q. Did you find the government corners, the 4 corners of section 9? A. Yes, sir. Q. I will ask you if you found half way stake or the north quarter corner of section 9 at that time? A. On that crooked line? Q. Yes. A. Yes, sir, we found the stake there and put up flag. Q. Where was that stake with reference to being midway between the east and west corners? A. I don't remember. I don't know whether it was quite in the center or not. We always thought it was in the center. All quarter stakes were thought to be in the center. Q. Was the line straight on the north side of section 9? A. I don't think any of the lines were very straight . . . . . Q. You say that you commenced to survey at the northwest corner of section 9? A. Yes, sir. Q. What did you find there? A. We found what we called a corner stake. Q. Anything else? A. When we got to the other one, there were two pits and a corner stake; all we had to go by— Q. Mr. Grant, just answer each question as I come to it. What did you find at the northwest corner of section? . . . A. A stake. Q. What mark on it? A. Well, I could tell at that time, but I do not remember much about it now. Q. What else did you see there besides this stake? A. 4 pits. Q. Did this stake have any letters or figures on it? A. Yes, sir. Q. Similar to other stakes? A. Exactly the same as other stakes. Q. Four pits and this stake? A. Yes, sir. Q. Just tell the course you took. A. We went and hunted up the quarter corner stake. Q. What was the next stake that you found? A. The quarter, half mile stake. Q. Where was that? A. Supposed to be a half mile from the other corner. I didn't measure that. Q. What did you do immediately after you left the northwest corner? A. Well, we went right to the middle of the section and found the quarter stake. Q. You went to the middle of the section; did you run right on to the quarter corner? A. No, sir; we had to hunt a good deal. Q. You set flag first, did you? A. Yes, sir. Q. Then you ran a half mile due east, did you? A. Yes, sir. Q. At that place did you find this quarter corner? A. Yes, sir. Q. How is that? A. Yes, sir. Q. Did you have any trouble in finding that quarter corner? A. Yes, lots of trouble. Q. Tell the court what you had to do. A. We found the corners before

the surveyor came there— Mr. Merritt: Just answer the questions so I won't have to object. A. We hunted for it. After we found the quarter stake, then we went to the next corner. Q. The surveyor started from the northwest corner and found another corner, didn't he? A. No, sir; we had corners found before the surveyor got there. Q. Where did the surveyor stop when he went a half mile from the northwest corner? A. At the quarter stake. Q. Came right up to the quarter stake? A. We put a flag there. We were only running on the line. Q. As I understand you, you had these corners figured out before the surveyor got there. A. Yes, sir. We had a timber culture in section 10 and had to find the corners to get our ditch fence on the line, on the northwest corner of 10 . . . . . Q. I will ask you if you had any trouble in locating that quarter corner? A. Yes, sir. Q. What trouble did you have? A. I don't understand. We just had to hunt for it until we got it. Q. Was it out of line between the northwest and northeast corners of section 9? A. It was in on 9. Q. How much? A. Quite a ways. I don't remember now. Q. And you found it in '82? A. Yes, sir; at the time we located our timber claim. Q. Could you tell the court about how many steps it was out of a straight line between the northeast and northwest corners of section 9? A. No, sir. Q. Quite a ways? A. Yes, sir. Q. And you had a great deal of trouble locating it? A. Yes, sir. Q. What did you find there when you found it? Just tell the court what you found. How did the ground look? A. Well, there was a stake and two pits. Q. What kind of a looking stake was it? A. Just like any other corner stake. Q. Any figures and letters on it? A. Yes, sir; I think it had 'one quarter' marked on it."

He also testified that he had a timber culture on section 10, and had dug a ditch fence beginning at the northeast quarter of section 9 and thence running east; that he took his course from the quarter section corner on the north line of section 9, and sighted across the northeast corner; that he afterwards had his land surveyed and found that his fence bore to the north. The testimony further shows that it was possible, at the time defendant Ball dug his post holes and built his fence, to mark a true line between the north corners

of section 9 by flagging, or by going on a high hill on section 10 from which both corners could be seen. The owner of section 4 farmed the land in dispute up to 1906, when he sold it, since which time it has passed through several ownerships. Defendant never made any demand for the crops and, so far as the subsequent owners are concerned, no claim to the title of the land, although there is some evidence that the crook or jog in the fence was an eyesore to him, and that he made some effort to have it straightened by voluntary agreement of the parties. At one time he offered to buy the land lying south of a true line between the north corners of section 9, but refused to consider the price asked. This he explains by saying that he was not then informed of his legal rights, and supposed that the lapse of time had confirmed title in the owners of section 4. No claim of ownership to the extent of threatening to take possession of the land or of the crops raised thereon was ever made, until August, 1910; whereupon this suit was brought to quiet title to the strip he alleges to be taken off of the north line of section 9. Defendants answered the complaint, making general denials, and alleging that the true boundary was lost, and prayed for a commission to issue to three competent men to establish the true boundary between sections 4 and 9. From a decree in favor of plaintiffs, an appeal is taken.

While presumptively quarter section corners are set upon a true line and at a point equidistant between section corners, it is well known that it is not always so. In fact, the carelessness and inattention marking the original government surveys in this part of the country have led the courts to say of their own judicial knowledge that a survey is seldom correct. *Koenig v. Whatcom Falls Mill Co.*, 67 Wash. 632, 122 Pac. 16; *Hyde v. Phillips*, 61 Wash. 314, 112 Pac. 257. When it is made to appear by competent evidence that a government monument does not accord with the survey or plat, the corner as established on the ground must control. It is contended that, inasmuch as the parties claimed no more than

the lands embraced within the limits of sections 4 and 9 respectively, the case of *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936, and like cases control. But these cases do not meet the facts here presented. In this case the enclosure was made by the appellant, and although we accept a straight line between the section corners as the true line, appellant left out of his inclosure a strip of land which has been farmed by others for twelve years or more, and no witness other than his relatives (he claims that the line was not straightened under a family agreement) have testified to any claim of ownership on his part. With the country open and it requiring, according to the testimony, no more than two days to reset the fence, appellant not only did not do so, but never attempted to carry out his agreement with his nephew to reset the fence. He knew the land was being bought and sold, yet did nothing to challenge the rights of the several owners to the land and the crops raised thereon. We agree with the trial judge that these facts do not work an estoppel, for there can be no estoppel under the pleadings. But they do lend faith and color, and tend to support the witness who swears that he found a quarter section corner on the north line of section 9, and that it was quite a ways south of the true line as he had supposed it to be. All these circumstances, when coupled with his positive declarations (and he is in no way impeached or disputed), make a preponderance of the evidence in favor of respondents.

While we have so far considered these facts as evidentiary and not as matters of estoppel, they also operate to deny appellants the relief asked in the way of a commission; for a preponderance of the evidence shows that, at about the time appellant built his fence, the quarter corner was in existence. It was not lost nor was it then uncertain. If it has become lost or uncertain during the eighteen or twenty years since he built his fence, he should not be heard to assert that fact as against present owners, for he would

thus, by his own negligence and delay, reap a reward which equity gives only to the vigilant. We conceive that there is a distinction between a lost corner and a corner the markings of which have been obliterated. If no monument or marking of a quarter corner can be found, or the testimony of its location be overcome by better evidence, a court will decree the establishment of a corner under the rule prevailing in the land department of the United States; that is, at a point equidistant from the section corners. *King v. Carmichael*, 45 Wash. 127, 87 Pac. 1120; *Koenig v. Whatcom Falls Mill Co.*, *supra*. But it does not follow that, if there be evidence of a corner which has been destroyed or obliterated by the lapse of time, a court will direct the establishment of a corner under the rule stated, or any other rule, for the law establishes an obliterated corner where the surveyor actually located it, and not where it ought to be located by a correct survey. *Inmon v. Pearson*, 47 Wash. 402, 92 Pac. 279.

The evidence is all before us and nothing would be gained by appointing a commission. The question is a judicial one, and it is only where the court can say from the evidence adduced that the corner is lost or uncertain, that the statute, Rem. & Bal. Code, §§ 947-999, is available to one who is disputing a boundary. We are satisfied that, although the line is irregular, respondents have sustained their cause of action by a preponderance of the evidence, and that they are entitled to an affirmance of the decree.

Affirmed.

MORRIS, PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 10167. Department One. October 10, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Ham, Yearsley & Ryrie, Plaintiff*, v. THE SUPERIOR COURT FOR GRANT COUNTY, *R. S. Steiner, Judge, Respondent.*[1]

WATERS—IRRIGATION—RIGHT TO APPROPRIATE. The right to appropriate land for an irrigation project depends upon the appropriator's right to the water to be used in such project.

NAVIGABLE WATERS—RIPARIAN OWNERS—RIGHT OF APPROPRIATION—CONSTITUTIONAL PROVISIONS. In view of Const., art. 17, § 1, asserting title in the state to the beds and shores of all navigable waters, including the line of high water in navigable lakes, the riparian owner on a navigable lake has no common law right as such owner to the waters of the lake for the purposes of irrigation superior to the right of appropriation possessed by owners of land not bordering upon the lake under the laws of the state relating to the appropriation of water for irrigation; and it is immaterial that such riparian rights are based upon titles from the general government prior to the adoption of the state constitution.

SAME—STATUTORY PROVISIONS. The riparian owner on a navigable lake is not given any right superior to others to appropriate the water thereof for the purpose of irrigation, by Rem. & Bal. Code, §§ 6325, 6326, in the act entitled an act providing for condemnation proceedings for right of way for irrigation and relating to the right of appropriation of water, which provides that any person is entitled to appropriate water for irrigation, if not otherwise appropriated, and that all owners on the banks of any stream or water course shall be entitled to the use of water therefrom, not otherwise appropriated, for the purposes of irrigation to the full extent of the soil for agricultural purposes.

SAME. Rem. & Bal. Code, § 6338, providing that all persons on the "margin, brink, neighborhood or precinct" of any lake shall have the right to place upon the bank a wheel, steam pump, or other machine for the purposes of raising the water to the level required for irrigating the land, does not give a riparian owner any right to appropriation superior to the right of other owners not bordering upon the lake, other than the right of appropriation common to all.

WATERS AND WATER COURSES — APPROPRIATION FOR IRRIGATION — NOTICE—NECESSITY. One who failed to post any notice of appro-

[1]Reported in 126 Pac. 945.

priation of water as required by statute, cannot, in the absence of any physical appropriation of the water, claim any prior appropriation thereof, as against one who had posted notice and prosecuted preliminary work.

SAME—NOTICE — RELATION — DILIGENCE — STATUTORY PROVISIONS. Under Rem. & Bal. Code, §§ 6317-6319, requiring the appropriator of water for irrigation to post notices and commence construction work for storage within three months, and if by diversion, to commence excavation work within six months, and that on a strict compliance with the rules, the rights shall relate back to the time of posting notice, and on failure to comply therewith, the rights shall be subject to the right of a subsequent appropriator faithfully complying with the same, the rights after posting notice depend upon such reasonable diligence in prosecuting the work as to clearly show an intent not to abandon the appropriation, as by the expenditure of $10,000 in preliminary work of great magnitude, requiring an entire season; and no want of diligence short of abandonment can be asserted by any one except a subsequent appropriator.

SAME—NOTICE—VALIDITY—TRESPASS. The posting of notices of appropriation of the waters of a lake, upon the unoccupied land of another near the shore line of the lake is not such a trespass as to amount to an unlawful initiation of the appropriation.

Certiorari to review a judgment of the superior court for Grant county, Steiner, J., entered January 10, 1912, upon findings in favor of the defendant, denying the right to condemn lands for an irrigation project. Reversed.

Voorhees & Canfield, for relator.

E. J. Cannon and *Graves, Kizer & Graves*, for respondent.

PARKER, J.—The relator has caused to be brought to this court by writ of certiorari, for review, a judgment of the superior court for Grant county, denying to it the right to condemn and acquire by right of eminent domain a tract of land belonging to the Northern Pacific Railway Company and R. F. Pettigrew, upon which to construct a dam for use in connection with, and as a part of, certain irrigation works which it proposes to construct.

The relator's right to acquire this land by condemnation rests upon its right to the water which it proposes to use in its irrigation project. That is, if it has lawfully acquired by appropriation the right to so use the water, it then has the right to acquire the land by condemnation in aid of its irrigation project. Otherwise it has no such right to so acquire the land, since its public use of the land rests upon its ability to use it as a part of its irrigation works, and, of course, it can have no irrigation works if it has no water therefor. The right to the water being the controlling question in the case, we will review the facts disclosed by the record, with a view to the determination of the relator's right thereto.

The relator is a domestic corporation, with power to acquire water rights and to construct, own and operate irrigation works, such as are here involved. It is the owner of a large quantity of land, aggregating some 25,000 acres, lying in a southwesterly direction, and at a distance of from 14 to 20 miles, from the southerly end of Moses lake, in Grant county. This is semi-arid land, but is capable of being rendered very productive by irrigation. A large portion of this land is capable of irrigation by gravity from Moses lake, and a large portion of it is capable of irrigation from the same source by pumping; provided a sufficient quantity of water therefor can be collected and stored in the lake for such use during the seasons when needed for that purpose. The Northern Pacific Railway and R. F. Pettigrew are the owners of the land which the relator seeks to condemn for its dam location, bordering upon the shores of the lake, and are also the owners of a large quantity of land aggregating in amount approximately the same as the land owned by the relator. This land lies within a distance of some two or three miles of the shores of the lake, and a large part of it lies immediately bordering upon the shores of the lake. The record title to this land is in the Northern Pacific Railway Company, and R. F. Pettigrew has a con-

tract with the railway company for the purchase thereof. There will be no occasion to make any distinction between the rights of the railway company and Pettigrew as we proceed, so we will hereafter refer to the land as belonging to both. This, like the land of the relator, is semi-arid land, a large part of it being capable of irrigation and thereby rendered very productive. Very little if any of this land is capable of irrigation by gravity from the lake, but a large part of it is capable of irrigation by pumping therefrom, providing a sufficient quantity of water can be collected and stored in the lake for such use during the seasons when needed for that purpose. It is conceded that all of the available water which can be collected and stored in the lake will be needed for the proper irrigation of either the land of the railway company and Pettigrew or the land of the relator. There is, therefore, not here involved any question of the apportionment of such water.

Moses lake is an inland body of fresh water some fifteen miles long in a northerly and southerly direction, is of an average width of about one-half mile, is at present from ten to thirty feet deep, and is navigable. Its shore lines were meandered by the United States government survey, and the uplands bordering thereon were patented by the government accordingly, to the railway company and others. It is therefore plain that all of the bed and shore lands of the lake are subject to the ownership of the state as asserted by article 17 of the state constitution. The general slope of the country, both to the north and to south of the lake, is southerly. Some distance to the north is a stream called Crab creek, into which several other streams flow. This is a considerable system of water courses. The water of these streams do not ordinarily reach the lake over the surface, but in seasons of high water their waters do occasionally reach the lake over the surface. The lake is also fed by another stream flowing into it from the north, and is probably also fed to some extent below the surface of the ground.

Whatever surface outlet the lake ever had was evidently at the southern end, where the slope of the country continues southerly and falls below the surface of the lake at a comparatively short distance from that end. Prior to the year 1904, the lake had no surface outlet within the memory of man.

Running across the southerly end of the lake and reaching to the higher land on the east and west, the ground is elevated but little above the surface of the lake, and is composed largely of sand dunes, which up to that time held the water from flowing to the lower ground to the south. In that year the flood waters from Crab creek and its tributary streams caused the water of the lake to raise sufficient to flow over the lowest place in the sand dunes at its southerly end, when the water cut a channel there through which it continued to flow, lowering the lake below its prior normal level some eight or ten feet. Thus there was first formed the only surface outlet to the lake known to man. The purpose of the relator is to store water in the lake by raising the water to its former normal level, for use in irrigating its lands, and also the lands of others lying southerly and southwesterly from the lake. To this end it is necessary to construct a dam at the outlet formed by the overflow of 1904. To acquire sufficient land upon which to construct such a dam, the relator commenced condemnation proceedings in the superior court for Grant county against the railway company and Pettigrew, the owners of the land at that point; and it is the judgment of that court denying the right of the relator to condemn such land which is sought by the relator to be reversed.

We have already noticed that the relator's right to condemn this land for its dam depends upon its right to the water. This right it claims by prior appropriation rested upon the posting and recording of appropriate notices, and the commencement and prosecution of work in pursuance thereof. The railway company and Pettigrew resist the

claims of relator, claiming right to the water of the lake themselves by virtue of being owners of the upland bordering thereon, and by prior appropriation; and also claiming that the relator has not acquired any right to the waters of the lake by its claimed acts of appropriation, because of the insufficiency of such acts to constitute a lawful appropriation, even if it could so lawfully acquire such right as against them. The claim of prior appropriation of the water, made by the railway company and Pettigrew in the trial court, was rested to some extent upon certain posted notices of appropriation. Those notices were, however, held by the trial court to be unavailing to them, and they are not here making any further claim under those notices. So far as their present claim by prior appropriation is concerned, they rest it upon certain work done by them looking to the impounding of water in the lake for the purpose of irrigating their land.

The claims of the railway company and Pettigrew to the water of the lake is rested largely upon the fact that they are the owners of land bordering upon the shores thereof. This fact, it is contended by their counsel, gives them all the rights of riparian owners in the water of the lake, as if the water flowed in an unnavigable stream over their land, and they being in need of all of the available water to irrigate their land, that no part of it is subject to appropriation by owners of land which does not border upon the lake. Thus is presented the question, Has the owner of upland bordering upon the shore line of an inland fresh water navigable lake any right to the water of such lake for the purpose of irrigating his land bordering thereon, superior to the right of appropriation possessed by owners of land which does not border upon the shore line of the lake, under the laws of the state relating to the appropriation of water for irrigation? The railway company and Pettigrew claim the water as riparian owners of the land, first, by virtue of their common law rights; and second, by

virtue of certain statutes of the state which they insist amount to a grant of a right of that nature to the owners of land bordering upon navigable water. We will notice these two grounds of their claims in this order.

The declaration of our state constitution contained in § 1, art. 17, thereof, that:

"The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes,"

and the decisions of this court touching the force and effect of that constitutional declaration, it seems to us fully answers in the negative the contentions of the railway company and Pettigrew, in so far as their claims are rested upon their asserted common law riparian rights.

In the early case of *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632, in considering the claimed right of an upland owner on tide lands bordering upon his land, and also the claimed right of such owner to access to navigable water over such tide land as against the state's grantee thereof, the court, resting its conclusions upon this constitutional declaration of ownership in the state, in so far as the upland owner's claimed common law right was concerned, at page 253 said:

"The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good. If the state cannot exercise its constitutional right to erect wharves and other structures upon its public waters in aid of navigation without the consent of adjoining owners, it is obviously deficient in the powers of self-development, which every government is supposed to possess—a proposition to which we cannot assent. See *Galveston v.*

Menard, 23 Tex. 349. Nor do we think this view in any way conflicts with the constitution of the state, but, on the contrary, we believe it is in strict harmony with it, when all its parts are construed together. We cannot think that the building by the state or its grantees of wharves upon shores of navigable waters would constitute either a taking or damaging of private property for public use, in contemplation of the constitution."

And in the case of *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278, where there was similarly involved the claimed right of an upland owner of land bordering on a navigable fresh water lake, the decision was adverse to such claim, the court at page 330 observing:

"The contention is that the upland owner on a navigable body of water has, in virtue of his patent from the United States, the right of a riparian proprietor in the water on which his lands borders—a right which the state cannot by its laws take away. This question, in so far as it is within the powers of the courts of this state to determine it, has been determined against the appellant's contention. In its constitution the state asserted ownership in the beds and shores of all navigable waters of this state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes. By a uniform course of decision this court has held that this declaration vested title in the lands claimed in the state."

Citing the numerous previous decisions of this court dealing with the claims of upland owners bordering upon both salt and fresh water. Since the rendering of that decision, the doctrine of the *Eisenbach* case has been recognized as the settled law of the state in the following cases: *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 88, 102 Pac. 1041, 104 Pac. 267; *Lownsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833; *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988; *Austin v. Bellingham*, 69 Wash. 677, 126 Pac. 59.

Counsel for the railway company and Pettigrew call our

attention to, and place special reliance upon, our decisions in *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190, and *Madson v. Spokane Valley Land & Water Co.*, 40 Wash. 414, 82 Pac. 718, 6 L. R. A. (N. S.) 257. It is argued that these decisions are, in effect, holdings that there are private rights of a riparian nature in the waters of navigable lakes. A critical examination of those cases however will show that the riparian rights which were there involved were not riparian rights in navigable water nor rights in water upon unpatented shore land, but riparian rights in water which was actually flowing over or resting upon land the title to which was in the owners claiming such riparian rights. In the *New Whatcom* case, the owner of the land was seeking simply to preserve his riparian rights in water which was flowing in an unnavigable stream over his land. It is true that a short distance above his land the stream emerged from a navigable lake, and it was the interfering with the waters of the lake that interfered with the natural flow of the water in the stream over his land. It was argued from these facts that since the interference with or diversion of the water from the lake was the diversion of navigable waters, it was, therefore, not an interference with the riparian rights of the owner, since he had no riparian rights in the lake. It was held, however, that notwithstanding the owner had no riparian rights in the lake, he did have riparian rights in the water flowing in the stream from the lake over his land, and those rights could not be interfered with to his damage, even though such interference was accomplished indirectly by the diversion of navigable waters. Had he been the owner of land bordering directly upon the lake, claiming riparian rights in the lake as such owner, the question now before us would have been involved. The *Madson* case will be best understood by a quotation therefrom. At page 417 the facts of that case are stated as follows:

"To the northwest from the main body of the lake, an arm of the lake extends over and across lands owned by respondents. These lands were acquired by a patent from the United States in October, 1886, before the adoption of the state constitution. No part of this arm of the lake lying upon respondents' land has ever been navigable for any purpose. The appellant, or its predecessors in interest, in the year 1899, entered upon the arm of the lake to the east of respondents' lands, between said lands and the main body of the lake, and constructed a dam across said arm and erected head gates therein, and to the west of respondents' lands constructed a canal from the arm of the lake to lands to be irrigated. The effect of the dam and the said canal is to withdraw the water of Liberty lake entirely from respondents' premises, so that respondents' access to the water on their land has been entirely destroyed, except for water which is permitted to run through the head gates during the irrigating season."

This case was decided in favor of the riparian claimant, upon the authority of the *New Whatcom* case. It will be noticed that title to the land upon which the nonnavigable water of the arm of the lake rested was acquired by patent from the United States before the adoption of our constitution, and therefore falls within the disclaimer of our constitution found in § 2, art. 17 thereof, as follows:

"The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States."

It is manifest that this water could not be interfered with under the guise of diverting navigable water, any more than if it were flowing over land of the claimant through an unnavigable stream. Thus it will be seen that these are not cases of an upland owner claiming riparian rights in navigable water or in the shore lands thereof, but simply cases of claims of riparian rights in nonnavigable water actually flowing over or resting upon lands the title to which was in the person claiming riparian rights therein. No decision of this court has come to our notice dealing directly with

a claim of water for irrigation made by an upland owner by reason of such land bordering upon navigable water; but it seems to us that our constitutional declaration of ownership, and former decisions touching the effect of that declaration, are clearly opposed to the contention that an upland owner can make lawful claim to the use of navigable water upon which his land borders, and rest such claim solely upon the ground that he has a common law right in such water by reason of his land bordering thereon, as against the state or one who appropriates such water in pursuance of the laws of the state.

Our attention is called to certain of our prior decisions dealing with the right of upland owners to have access to navigable waters for purposes of navigation, among which the following may be noted: *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813, 102 Am. St. 905, 70 L. R. A. 272; *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, 87 Pac. 937. Whatever the right of the railway company and Pettigrew may be to have access to the waters of Moses lake for the purpose of navigation, it is apparent that the appropriation to the extent here contemplated by the relator will not render the lake any less accessible to them for purposes of navigation than it is at present. So it becomes unnecessary to further notice that question.

Some contention is made in behalf of the railway company and Pettigrew rested upon the fact that the larger portion of the lands owned by them and upon which ownership they base their claimed common law rights was acquired by grant from the United States prior to the admission of the state to the Union and the adoption of our constitution; the argument being that such rights attached at the time of the grant and could not thereafter be lessened by any constitutional or statutory assertion of title on the part of the state. A similar contention was addressed to the court in the case

of *Kalez v. Spokane Valley Land & Water Co.*, 42 Wash. 43, 84 Pac. 395, where the court observed:

"The latter [appellant] contended that their grantors, having acquired the property from the government prior to statehood, became endowed with vested rights in and to the use of the waters and shores of said lake upon which their land abutted, and that the constitution and statutes of the state could not curtail those rights. It may be conceded that any vested rights possessed by their grantors and themselves could not be interfered with; but as this is a navigable body of water, the United States government, except for certain purposes in no manner involved here, could not dispose of the land below ordinary high water mark, but would hold said lands for the benefit of the future commonwealth which, upon attaining statehood, would become entitled to sovereignty thereover, and to the control and disposition of the waters, except where disclaimed by section 2, article 17, of the state constitution."

It is suggested that these remarks were largely dictum and not necessary in the decision of that case. There is some reason for that suggestion in view of the facts there involved. Nevertheless the view there expressed seems to be fully in accord with the views of the supreme court of the United States as expressed in *Shively v. Bowlby*, 152 U. S. 1. We are of the opinion that common law riparian rights in navigable waters, if it can be said that the common law recognized such rights, have not existed or been recognized in this state since the adoption of our constitution; at least so far as the upland owner having any right to occupy in any way the beds or shore lands of such waters or to take from such waters water for irrigation as against the state, its grantees, or those who have appropriated such water for purposes of irrigation in compliance with the laws of the state. This reduces our problem to one of prior appropriation as between the railway company and Pettigrew and the relator, since both have an equal right to appropriate the water regardless of their ownership of any particular lands, unless there is some statute law of the state giving to Petti-

grew and the railway company some right in the nature of a riparian right superior to that of the appropriation right sought to be exercised by the relator.

In addition to their claimed common law riparian rights, counsel for the railway company and Pettigrew insist that the statutes of the state give them a right to this water for irrigation of their land, which right is in the nature of a riparian right, superior to any appropriation right which can be exercised by the relator. This claim is rested upon §§ 6325 and 6326, Rem. & Bal. Code, taken from the Laws of 1899, p. 261. We quote both from the title of the act and the body thereof, since the title will aid us in arriving at the intention of the legislature in defining the water rights there mentioned. The title and §§ 1 and 2 are as follows:

"An Act providing for condemnation proceedings for right-of-way for irrigating ditches, canals, and flumes for agricultural and mining purposes and relating to right of appropriation of water.

"Be it enacted by the Legislature of the State of Washington:

"Section 1. That any person, corporation or association of persons is entitled to take from the natural streams or lakes in this state water for the purposes of irrigation and mining, not theretofore appropriated or subject to rights existing at the time of the adoption of the constitution of this state, subject to the conditions and regulations imposed by law: Provided, That the use of water at all times shall be deemed a public use, and subject to condemnation as may from time to time be provided for by the legislature of this state.

"Sec. 2. All persons who claim, own or hold possessory right or title to any land, or parcel of land or mining claim within the boundaries of the state of Washington, when such lands, mining claims or any part of the same are on the banks of any natural stream of water, shall be entitled to the use of any water of said stream not otherwise appropriated for the purposes of mining and irrigation to the full extent of the soil for agricultural purposes."

It will be noticed that, in addition to referring to rights of way for ditches, canals and flumes, the title concludes: "and relating to right of appropriation of water." The first section seems to be broad enough to give the right of appropriation to all persons for irrigation who are able to devote the water to such use. It might seem, therefore, unnecessary for the statute to define the rights of the persons mentioned in the second section, if it was only intended to give such persons the right of appropriation as distinguished from rights in the nature of riparian rights of upland owners; but even the right there granted, it will be noticed, is only to water "not otherwise appropriated for the purposes of mining and irrigation to the full extent of the soil for agricultural purposes." It may not be easy to see the purpose of the legislature in thus defining the rights of certain upland owners in a separate section from that in which it defines the rights of others. Such a division of the subject does seem to suggest that the rights of the upland owner were intended to be in some degree different from those of other appropriators; but reading the two sections together and having in mind the language of the title, which tells us that the act relates to the right of appropriation of water, we are constrained to hold that it was not intended thereby to confer or define any rights of a riparian nature, nor give to the upland owner any different right to take water from navigable streams than the right of appropriation which may be exercised by all persons. Our attention is also called to § 6338, Rem. & Bal. Code, which provides:

"All persons on the margin, brink, neighborhood, or precinct of any natural stream or lake of water shall have the right and power to place upon the bank of such stream or lake a wheel, steam pump, or other machine for the purpose of raising water to the level required for the use of such water in irrigating land."

We are unable to see how this section can avail the railway company and Pettigrew in their claim of superior right, since

it does not purport to give to the upland owner any different right than that possessed by other landowners whose land is in the "neighborhood" of the water. We think that this section, like those above discussed, confers upon landowners nothing more than an equal right of appropriation with others, regardless of their land bordering upon the shore line. We conclude that the right of the railway company and Pettigrew and the relator to the waters of Moses lake, and to collect and store waters therein for the purpose of irrigation, is simply an equal right to exercise the rights of appropriation, and their respective rights are determinable by a solution of the question, Who has exercised the prior right of appropriation? We will now address ourselves to that question.

In December, 1908, and January, 1909, the relator caused to be made an investigation and preliminary survey for the purpose of determining the practicability of irrigating its land from the waters of Moses lake. Becoming satisfied therefrom that such irrigation was practical, at least to some extent, it caused a notice of appropriation of water of the lake to the extent of 1,000 cubic feet per second to be given, stating therein the intention to make a storage reservoir of the lake by means of a dam at its outlet and to divert the water at that point. This notice was posted at the point of intended diversion, on January 20, 1909, and thereafter duly recorded in the office of the auditor of Grant county. Thereafter further investigation led the relator to conclude that another point of diversion would be more desirable, and on February 8, 1909, it caused another notice of appropriation of the water of the lake to be posted and recorded, which was in substance the same as the first one, except that the intended point of diversion was therein stated to be at the most southern extremity of the lake, which point is a mile or more in a southeasterly direction from the outlet. This notice was posted at the stated point of intended diversion.

The relator thereupon caused survey to be immediately commenced and made for the location of its intended head

gates and ditch lines, from the last named point of diversion to its land, and caused a considerable amount of work to be done in the way of investigating the character of the ground bordering upon the southerly end of the lake and the proposed dam location at the outlet. This investigation consisted largely of sinking several holes called test holes, some of which were as much as 24 feet deep, at different points along and back from the shore of the southerly end of the lake, for the purpose of determining any possible underground flow or seepage of the water from the lake, and also to determine the nature of the foundation that might be necessary for the construction of the dam. The relator's engineer also made preliminary estimates based upon the surveys and information thus obtained, of the probable cost of constructing the dam, head works, pipe, flume and ditch lines necessary to the project, finding that it would require about three-quarters of a million dollars therefor, assuming that enough water could be stored to irrigate 20,000 to 25,000 acres during the seasons when needed. This work was done in the summer of 1909. It appears that at that time but little was known as to the amount of water that could be collected and stored in the lake for use during the seasons when needed. This problem was affected by the nature of the ground and sand dunes at the south end of the lake, as to the capability of this ground to hold the water to any considerable height above that which it then was, the possibility of collecting sufficient water to irrigate all of relator's land, and the amount of loss of water by evaporation, as well as by seepage or flow from the lake under the surface. The relator caused these matters to be investigated at considerable expense, for the purpose of determining the extent of the works it would ultimately construct; it being apparent that all the water that could be stored under any circumstances would be needed for its irrigation project. The flow of the surface water into the lake, and the flow of other streams which did not reach the lake over the surface but which were thought to affect the lake's supply

were measured and the matter of loss by evaporation was investigated at the relator's expense, though it was carried on under the direction of the United States government geological survey employees, they furnishing suitable appliances therefor. This investigation was prosecuted through more than one season, and up to the time of the hearing in the condemnation proceeding. It is apparent that it was necessary to continue the experiments testing the flow of the streams and the amount of evaporation, over at least one entire season, in order to secure reliable data thereon. This work was continued with considerable diligence during that period and up to the time of the hearing of the condemnation in February, 1911.

In the fall of 1910, considerable information had been accumulated upon the question of the possible water supply and evaporation, though the final report from the geological survey employees upon the water measurements and evaporation was not made by them until February, 1911. On July 6, 1910, the relator caused to be posted and recorded another notice of the appropriation of the waters of the lake, in substance the same as the former notices, except that this notice specified three additional points of intended diversion, and also specified the point of intended diversion at the extreme southern end of the lake as in the second notice. This notice was posted at the several specified points of the intended diversion. On September 27, 1910, the relator's engineer commenced a topographical survey of the ground and sand dunes around the southern end of the lake, and on October 4, 1910, located and commenced grading with teams and scrapers the site of its proposed dam at the outlet of the lake. This work was prosecuted until October 11, 1910, when further work by the relator was enjoined by the superior court for Grant county at the instance of the railway company and Pettigrew. The grounds of the injunction were that the work was being carried on upon the land belonging to them, without any right so

to do having been acquired by grant or condemnation. While the relator was at work on its dam on October 7, 1910, it filed its petition instituting condemnation proceedings in the superior court for Grant county against the railway company and Pettigrew, to acquire the land upon which to construct their proposed dam. Service was had upon the defendants in that proceeding October 8 and 10, 1910. It is in that proceeding that the right of the relator to condemn was denied.

Up to and until the time of the commencement of the condemnation proceedings, the relator had expended for surveys, investigation of available water supply, the storage capacity of the lake, and the possible loss of water therefrom by evaporation, $10,000 or more. About one-half of this sum was spent in surveys preliminary to the construction of the works, and the other half in investigations of the nature mentioned. There is some conflict in the opinions of the engineers who testified for the respective parties as to the proper construction of the dam to hold the waters of the lake and as to the probable cost of such a dam, their estimates being from a few thousand to $80,000. Taking the evidence as a whole, however, there seems to be but little doubt that the entire project contemplated by the relator will require an expenditure of more than a half million dollars. There appears to be but little doubt of the practicability of the relator's project, to the full extent of the water that can be accumulated and stored for use during the seasons when needed. The only unsolved problem seems to be as to the amount of water that can be so accumulated and stored. No question is made as to the ability of the relator to carry the project through, so far as financing it is concerned.

Turning now to the claimed appropriation of the water made by the railway company and Pettigrew, we have already noticed that the trial court decided against all rights claimed by them under certain notice of appropriation, and that no claim is here made by them resting upon those notices. Petti-

grew entered into a contract with the railway company for the purchase of the land he now claims the water for, in December, 1909. He made some investigation of the land as to the possibility of irrigating it by pumping from the lake, in the winter of 1909 and 1910, but has made practically no investigation of the amount of water available therefor, nor of the storage capacity of the lake, nor were any surveys ever made by him locating ditch or flume lines.

In the latter part of September, 1910, Pettigrew caused to be located and staked upon the ground at the outlet of the lake a site for a dam he proposed to build. Some small amount of material was then brought for the commencement of its construction, and some little grading done by him a few days before the relator located its dam and commenced grading for its construction. Soon thereafter the injunction followed, resulted in stopping the relator's work, and, as we have noticed, the condemnation proceedings were commenced by the relator to acquire land for the location of its dam at about the same time. Since then Pettigrew has done considerable work upon his dam, but he has fallen far short of making an actual appropriation of the water, either by putting it to use for irrigation, or by completing the construction of such works as would enable him to so use the water when needed. He had no prior appropriation notice posted to which his work could relate back to upon its completion. Had he completed his works and actually been taking the water, we might then have a different question, so far as his rights as against the relator are concerned.

The question, then, upon this branch of the case is, Did the relator exercise such diligence as to prevent its right of appropriation being lost as against the rights of Pettigrew? If Pettigrew's work rested upon a prior posted notice of appropriation, we might have a question of prior appropriation as between the two. But because of want of notice of appropriation on the part of Pettigrew he could in no event be deemed a prior appropriator, at least not unless he had com-

pleted the physical appropriation of the water. This we think puts the relator in such a position that its acts looking to the construction of its work, must be viewed in the most favorable light, since we find its claim of appropriation resting upon valid posted notices, and at least some work performed in pursuance thereof, and no one else having initiated any such right by posting notices of appropriation nor made any actual consummated appropriation. This right of appropriation here involved, in order to be effective, must have been initiated under the provisions of §§ 6317, 6318 and 6319, Rem. & Bal. Code, which are as follows:

"Any person, persons, corporation, or association desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended storage or diversion, stating therein,—

"(1) That such appropriator claims the water lying, being, or flowing to the extent of one cubic foot of water per second of time, or some multiple or some fractional portion thereof;

"(2) The purpose for which said water is appropriated, and the place or places, as near as may be, of intended use;

"(3) The means by which it is intended to store or divert the same;

"(4) A copy of the notice must, within ten days after it is posted, be filed for record in the office of the county auditor of the county in which it is posted." § 6317.

"If said use is by storage, the appropriator must, within three months after the notice is posted, commence the construction of the works by which it is intended to store the same. If said use is by diversion, the appropriator must, within six months after the notice is posted, commence the excavation or construction of the works by which it is intended to divert the same; it being herein expressly provided that such works must be diligently and continuously prosecuted to completion, unless temporarily interrupted by the elements." § 6318.

"By a strict compliance to the above rules the appropriator's rights to the use of the water actually stored or diverted relates back to the time the notice was posted; but a failure to comply therewith deprives the appropriator of the right

to the use of the water as against a subsequent appropriator who faithfully complies with the same." § 6319.

It is plain from these provisions that no acts or work looking to an appropriation of water will cause the completed appropriation to relate back to the time of its actual accomplishment, except the posting and recording of appropriation notice be done as provided by §6317. It is therefore plain that Pettigrew's claimed acts of appropriation cannot, in any event, relate back in point of time to an actual consummated appropriation by him. On the other hand, the relator's rights, resting upon notices of appropriation, depend only upon its diligence in work performed looking to a completed appropriation, and when completed will relate back to the time of posting of notices. And in view of the fact that no one else has given notice of prior appropriation, the relator's diligence is not to be measured as against some other claimant's rights, but its diligence would seem to be sufficient to preserve its rights, if its work has been such as to clearly show an intention not to abandon its appropriation of the water. It is provided by §6319 that a failure to comply with the rules prescribed by these sections, "deprives the appropriator of the right to use the water as against a subsequent appropriator who faithfully complies with the same." It evidently is the legislative intent that such an appropriator will not lose his right of appropriation by mere want of diligence short of an abandonment of his claim, except as against a subsequent appropriator who complies with the provisions of these sections; and it is apparent there cannot be such an appropriator, except it be one who causes to be posted notice of appropriation, or, possibly, one who has made a completed physical appropriation of the water. We have neither in this case to come in conflict with the relator. It seems to us that, in view of this fact, the relator must have been so wanting in diligence in following its notice of appropriation by acts looking to the construction of its works, as to amount to a practical abandonment of its project, before we can say that it has lost the

right to proceed and complete its appropriation. In view of the diligence on the part of the relator, evidenced by its surveys and investigation of the storage capacity of the lake, the amount of water available for storage therein, and the amount of possible loss of water by evaporation, we are of the opinion that the relator has not lost the right to proceed with its appropriation of the water. An examination of the decisions of the courts will show that the question of due diligence on the part of an appropriator in performing work following his notice of appropriation must rest largely upon the facts and circumstances of each particular case. The conditions and necessities of different projects are so varying that it is difficult to make more than a very general statement of a rule of diligence applicable to all cases. Probably as comprehensive general statement of the rule as the law will warrant is that found in the text in 40 Cyc., at page 711, as follows:

"The appropriator must proceed with reasonable diligence to construct and complete such works as are necessary for the immediate application of the water to the intended use. What is a reasonable time and what constitutes reasonable diligence depend largely on the facts of the particular case . . . but it may be said that they depend chiefly on the physical circumstances of the locality, the nature and condition of the region to be traversed and its accessibility, the length of the season in which work is practicable, the supply of labor, and the magnitude and difficulty of the works necessary. . . ."

The following decisions are instances of the application of the rule as thus very generally stated: *Ophir Mining Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901; *Dyke v. Caldwell*, 2 Ariz. 394, 18 Pac. 276; *Nevada Ditch Co. v. Bennett*, 30 Ore. 59, 45 Pac. 472, 60 Am. St. 777; *Sand Point Water & Light Co. v. Panhandle Development Co.*, 11 Idaho 405, 83 Pac. 347; *Whited v. Cavin*, 55 Ore. 98, 105 Pac. 396.

These cases involve conflicting claims of appropriation, and it might well be argued that at least some of them would

support relator's claim, even if the claimed rights of the railway company and Pettigrew were based upon valid notices of appropriation. In view of the magnitude and difficulties of the successful completion of the relator's project, we think that the work performed by it looking to the completion of its appropriation of the water was sufficient to preserve its rights to so appropriate the water. It follows that in the prosecution of that work it has the right to acquire by eminent domain proceedings the land for the location of its dam.

We have arrived at this conclusion without taking into account in the relator's favor the work performed by it upon the construction of its proposed dam, which it was enjoined from prosecuting, since counsel for the railway company and Pettigrew insist that that work was performed in the commission of a trespass upon the land sought to be acquired, and should not, therefore, be taken into consideration as lending support to the relator's claim of appropriation of the water. We find it unnecessary to express an opinion as to the relator's right to regard those acts as a part of the construction work for which he is entitled to credit as a part of his work looking to the appropriation of the water. We think its other work has been sufficient to preserve its rights under the circumstances.

All of the relator's notices of appropriation were posted upon unoccupied land belonging to the railway company and Pettigrew, near the shore line of the lake, at the stated points of intended diversion. This, it is contended by counsel for the railway company and Pettigrew, constitued such a trespass upon their land by the relator that it could acquire no right to the water based upon such notices as an initiation of such right. They invoke the general rule that

"An appropriation cannot be initiated unlawfully by a trespass upon private land, and no rights can be obtained thereby against the land owner whose land is trespassed upon." 1 Wiel, Water Rights in Western States (3d ed.), § 221.

As stated by Wiel in his work on Water Rights in Western States, vol. 1, § 221 (3d ed.), and also the general rule, the right of appropriation applies only to water upon public lands, as recognized by this court in *Sander v. Wilson*, 34 Wash. 659, 76 Pac. 280. A number of decisions have been cited by counsel for the railway company and Pettigrew illustrating the application of these rules. It seems to us, however, that counsel's argument is fully answered by the fact that the water right sought to be initiated and acquired by the relator is not a right to take water from the land of the railway company and Pettigrew, nor the right to take water to which they have any higher or different right to appropriate than the relator has. The relator is not seeking to condemn any water rights belonging to the railway company and Pettigrew. We have already seen that it is under no necessity of acquiring any of their water rights, since they, like it, possess only the right of appropriation which they have not lawfully exercised. That is, they have neither lawfully initiated nor consummated an appropriation.

When the relator caused the appropriation notices to be posted, it was not thereby seeking to acquire the ground upon which they were posted, but was seeking only to acquire a water right which it had an equal right with the railway company and Pettigrew and all others to acquire by appropriation. Now had the relator's notices of appropriation been posted below the shore line of the lake over the water, or on the land below the line of ordinary high water, they would then have been upon the state's land, and of course such posting would have been entirely free from the objections here urged. It is evident that they were posted sufficiently near the shore line and the designated point of diversion of the water to give legal notice of the intended diversion, storage and use of the water. They were posted upon land wholly unoccupied, and we find nothing in the record showing that they were ever interfered with by the railway company or Pettigrew, nor that the railway company or Pet-

tigrew ever objected to them being posted upon their land, nor was the possession and enjoyment of the land by the railway company or Pettigrew thereby in the least interfered with. No authority has come to our notice indicating that such a technical trespass would render appropriation notices so posted unavailing to the appropriator, where the water sought to be appropriated is not flowing upon nor riparian to the land thus technically trespassed upon. An examination of the decisions cited, illustrating the general rule that water appropriation rights and land preemption rights cannot be lawfully so initiated, will show that the decisions holding against the would-be appropriator or preemptor resting claims upon such an attempted initiation of rights, deal altogether with claims made by the trespasser to the identical property trespassed upon by him. Among the decisions called to our attention by the counsel for the railway company and Pettigrew, the following we think are as favorable to their position as can be found, and they belong to the class we have indicated: *Prentice v. McKay*, 38 Mont. 114, 98 Pac. 1081; *McGuire v. Brown*, 106 Cal. 660, 39 Pac. 1060; *Snyder v. Colorado Gold Dredging Co.*, 181 Fed. 62; *Atherton v. Fowler*, 96 U. S. 513. We are of the opinion that the posting of the appropriation notices on the land of the railway company and Pettigrew, under the circumstances here shown, did not render them unavailing to the relator as a lawful initiation of the appropriation of the water of Moses lake.

We conclude that the relator is only exercising its right of appropriation from the waters and land belonging to the state; that its exercise of such right is not in conflict with any private riparian rights, nor in conflict with any other prior lawfully initiated or consummated appropriation; and that the work performed by the relator has been such as to preserve its right to proceed with its work looking to a completed appropriation. It follows that the judgment of the trial court must be reversed, with directions

to allow the relator to acquire the land for the dam location by condemnation, upon payment of compensation therefor after being ascertained in the manner provided by law. It is so ordered.

FULLERTON, CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 10755. *En Banc.* October 10, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Charles A. Reynolds, Plaintiff*, v. I. M. HOWELL, *as Secretary of State et al.*, and W. W. BLACK, *Defendants.*[1]

ELECTIONS—ELIGIBILITY OF CANDIDATES—WHO MAY QUESTION. A citizen and elector has the inherent right to maintain an action questioning the eligibility of a candidate for election to a public office.

JUDGES — ELIGIBILITY TO OTHER OFFICE — CONSTITUTIONAL PROVISIONS. Under Const., art. 4, § 5, providing that the judges of the supreme and superior courts shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall be elected, a judge elected for the term of four years is ineligible as a candidate for governor during such period, although his term as judge would expire before the term of governor commences; "eligible" meaning competent to be chosen, and having reference to the time the choice is made, without reference to the time when the term begins (CROW and FULLERTON, JJ., dissenting).

Application for a writ of prohibition, filed in the supreme court September 30, 1912, to prohibit the state canvassing board from certifying defendant's nomination as governor. Granted.

Reynolds, Ballinger & Hutson, for relator.

Robert McMurchie, J. E. Horan, and *J. A. Coleman*, for defendant Black.

GOSE, J.—This is an application for a permanent writ of prohibition prohibiting the state canvassing board from

[1]Reported in 126 Pac. 954.

certifying to the secretary of state the nomination of the defendant Black as governor of the state, and prohibiting the latter from certifying his nomination.

The relator alleges in his affidavit that he is an adherent of the democratic party, a citizen of the United States, a citizen, resident, taxpayer and elector of the state; that the defendants Howell, Clausen and Lewis constitute the state canvassing board; that the defendant Howell is the secretary of state; that at the primary election held on the 10th day of September, 1912, more than four persons appeared as candidates for the democratic nomination for governor; that no candidate received forty per cent of all first choice votes cast for candidates for that office on the democratic ticket, and that the defendant Black, who was one of the candidates, received a larger number in the aggregate of first and second choice votes for the nomination than any other candidate and that he was nominated, if he was eligible to the nomination.

It is further alleged that on November 2d, 1908, the defendant Black was duly elected to the office of judge of the superior court of the state for Snohomish county, for the term of four years commencing on the second Monday in January, 1909, and until his successor should be elected and qualified; that he duly qualified for the office, entered upon the discharge of his duties, and still is such judge, and that by reason of his election and qualification as such judge, he is ineligible to be elected or to hold the office of governor of the state for the term commencing on the Wednesday following the second Monday of January, 1913. It is further alleged that the state canvassing board and the secretary of state have declared their intention to, and will, certify his name as the candidate on the democratic ticket for governor, unless prohibited by this court. The defendants have demurred to the affidavit upon the ground that it does not state facts sufficient to entitle the relator to relief.

The parties to the proceeding unite in asking the court

to take jurisdiction and dispose of the case upon the merits. We think the right to maintain an action questioning the eligibility of a candidate for election to a public office is inherent in a citizen and an elector. *State ex rel. Harvey v. Mason*, 45 Wash. 234, 88 Pac. 126, 9 L. R. A. (N. S.) 1221. Moreover, the proceeding seems to have the sanction of the statute, Laws 1907, p. 471, § 25; Rem. & Bal. Code, § 4829.

The provisions of the constitution relied upon by the relator as establishing the ineligibility of the defendant Black are as follows: "The term of office of all superior judges in this state shall be for four years from the second Monday in January next succeeding their election, and until their successors are elected and qualified." Constitution, art. 4, § 5.

"The judges of the supreme court and the judges of the superior court shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected." Constitution, art. 4, § 15.

The relator contends that the provision last quoted means that Judge Black is not eligible to be elected to any office other than a judicial one during his term. On the other hand, counsel for Judge Black asserts that the ineligibility extends only to holding another office during his term, and that inasmuch as his term will expire a day or more before the governor's term will begin, if his successor has then been elected and has qualified, it will be presumed at this time that this contingency will happen, or at most that it will not be presumed that it will not happen, and hence that Judge Black is eligible.

We think the relator has correctly interpreted the constitution. It will be observed that the inhibition is not limited to the incumbency of the judge, but that it is extended to the term for which he shall have been elected. It was conceded at the bar, and it cannot be doubted, that a judge cannot qualify himself to hold an office other than a judicial

one during his elective term, by resignation or by any other act on his part. The framers of the constitution knew that judges would be called upon to sit in judgment upon cases of large public and private moment, and they also knew that the righteous cause is not always the popular one, and it was their purpose, in so far as it could be accomplished by the paramount law, to keep the judges out of politics. Both the letter and the spirit of the constitution are in harmony with this view. Its soundness is illustrated by the fact that a judge cannot qualify for an office, other than a judicial one, during his term by resignation or otherwise, and by the further fact that his term continues until his successor has been elected and has qualified.

If the legislature had enacted that the term of governor should commence on the second Monday in January next succeeding his election, Judge Black would not then be qualified either to be chosen or to hold the office. We cannot think that the framers of the constitution intended that the qualification of a judge for election to another office when that officer was elected during his term, should depend upon the contingency of that office beginning a day before or a day after the expiration of his term, nor was it their purpose to require the elector to speculate as to whether a candidate, ineligible to hold an office when voted for, might or might not be eligible to hold the office when the time to qualify arrived. There were lawyers of great learning, experience and ability in the convention that framed our constitution, and they knew the importance of confining judges to the performance of their judicial duties, and the evils that would attend if judges were permitted during their term to take part in the activities of a political campaign for the furtherance of their own political ambitions. If it had been intended to limit a judge to hold an office other than a judicial one during his term, we have no doubt that clear and express words indicating that intention would have been used. Our conclusion is that Judge Black is ineligible to

election as governor. This view is in accord with the definition given to the word "Eligible" by the majority of the lexicographers and text writers, and with what impresses us as being the best considered cases. Black defines the word eligible as "capable of being chosen," "competent to hold office"; Bouvier & Anderson, "this term relates to the capacity of holding as well as that of being elected to an office"; Abbott, "the term eligible to office relates to the capacity of holding as well as the capacity of being elected;" 19 Am. & Eng. Ency. Law, 397, "Capable of being chosen," "implying competency to hold the office if chosen;" Worcester, "legally qualified," "capable of being chosen;" Webster, "that may be elected," "legally qualified to be elected and to hold office," "fitted or qualified to be chosen or elected," "subject to election," "forming a matter of choice," "requiring selection." The following cases also support this construction: *Searcy v. Grow*, 15 Cal. 118; *People ex rel. Simmons v. Sanderson*, 30 Cal. 160; *Taylor v. Sullivan*, 45 Minn. 309, 47 N. W. 802, 22 Am. St. 729, 11 L. R. A. 272; *Territory ex rel. Parker v. Smith*, 3 Minn. 240, 74 Am. Dec. 749; *People v. Leonard*, 73 Cal. 230, 14 Pac. 853; *State v. McMillen*, 23 Neb. 385, 36 N. W. 587; *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538; *State ex rel. Thayer v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; *State ex rel. Nourse v. Clarke*, 3 Nev. 566.

In *Searcy v. Grow* in construing the following language in the California constitution, "no person holding any lucrative office under the United States or any other power shall be eligible to any civil office of profit under this state," etc., the court said:

"The counsel for the appellant contends that the true meaning of the constitution is, that the person holding the Federal office described in the twenty-first section is forbidden to take a civil state office while so holding the other; but that he is capable of receiving votes cast for him, so as to give him a right to take the state office upon or after resigning the Federal office. But we think the plain meaning of the

words quoted is the opposite of this construction. The language is not that the Federal officer shall not *hold* a state office while he is such Federal officer, but that he shall not, while in such Federal office, be *eligible* to the state office. We understand the word eligible to mean capable of being chosen—the subject of selection of choice. The people in this case were clothed with this power of choice; their selection of the candidate gave him all the claim to the office which he has; his title to the office comes from *their* designation of him as sheriff. But they could not designate or choose a man not eligible, *i. e.*, not capable of being selected. They might select any man they chose, subject only to this exception, that the man they selected was capable of taking what they had the power to give.

"We do not see how the fact that he became capable of taking the office, after they had exhausted their power, can avail the appellant. If he was not eligible at the time the votes were cast for him, the election failed. We do not see how it can be argued that, by the act of the candidate, the votes which, when cast, were ineffectual because not given for a qualified candidate, became effectual to elect him to office."

In *People ex rel. Simmons v. Sanderson* the court said that the constitutional provision dividing the powers of government into three separate departments, the legislative, executive and judicial, and providing further that no person charged with the exercise of powers belonging to one of these departments should exercise any function appertaining to either of the others, was conceived in the same spirit as the provision we have quoted and that:

"One of its objects seems to have been to confine judges to the performance of judicial duties; and another to secure them from entangling alliances with matters concerning which they may be called upon to sit in judgment; and another still to save them from the temptation to use their vantage ground of position and influence to gain for themselves positions and places from which judicial propriety should of itself induce them to refrain."

In the *Taylor* case, the words "eligible to any office" were held to mean "electable, proper to be chosen, qualified to be

elected." *Parker v. Smith* announces the same view. In the *Leonard* case, it was held that the word "eligible" in the constitution refers to the capacity to hold as well as to be elected to office. In the *McMillen* case, it was held that one not an elector at the date of his election was not eligible to an office, the term of which commenced after he had become an elector. In the *Corliss* case, it was held that a person cannot be elected who is ineligible or, in other words, "incapable of being elected." In the *Boyd* case, the word "eligible," found in the Nebraska constitution, was held to mean "qualified to be chosen." In *State ex rel. Nourse v. Clarke*, the court in construing a provision of the Nevada constitution to the effect that: "No person holding any lucrative office under the government of the United States, or any other power, shall be eligible to any civil office of profit under this state," said:

"But instead of restricting the meaning of the word 'eligible,' as defendant contends, we think, to carry out the intention of the constitutional convention, we ought rather to give it a more extended signification than is generally given, and hold that it means both "incapable of being legally chosen" and "incapable of legally holding."

Counsel for Judge Black rely upon the following cases: *Smith v. Moore*, 90 Ind. 294; *State v. Trumpf*, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512; *Hoy v. State ex rel. Buchanan*, 168 Ind. 506, 81 N. E. 509; *Brown v. Goben*, 122 Ind. 113, 23 N. E. 519; *Shuck v. State ex rel. Cope*, 136 Ind. 63, 35 N. E. 993; *Bradfield v. Avery*, 16 Idaho 769, 102 Pac. 687, 23 L. R. A. (N. S.) 1228; *Demaree v. Scates*, 50 Kan. 275, 32 Pac. 1123, 34 Am. St. 113, 20 L. R. A. 97; *Kirkpatrick v. Brownfield*, 97 Ky. 558, 31 S. W. 137, 53 Am. St. 422, 29 L. R. A. 703; *State ex rel. Perine v. Van Beek*, 87 Iowa 569, 54 N. W. 525, 43 Am. St. 397, 19 L. R. A. 622.

Whilst these cases support their view, the rule of construction which they announce was ably challenged by a minority of the court in the Indiana, Wisconsin, Kansas and Iowa cases. In *Smith v. Moore* the majority of the court held that

the words "eligible to an office" mean "legally qualified as an officer to perform the duties of a public office." Judge Elliott in dissenting approves the rule of construction announced in *Searcy v. Grow*, *State v. Clarke*, and *People v. Sanderson*, and says that the word "eligible" refers to the time of election, and quotes with approval the language we have excerpted from *People v. Sanderson*. In *State v. Trumpf* it was held that one who was an alien when elected to office, became eligible to hold the office by admission to citizenship before the commencement of his term of office. On a motion for a rehearing, Ryan, Chief Justice, said that he adhered to the rule of interpretation announced in the earlier cases on the ground of judicial expediency, but expressed the opinion that the better view was that one receiving votes for office should then be eligible to hold the office. In *Hoy v. State* it was held that one who is ineligible to hold office at the time of his election, but who can remove the disqualification by some act of his own before the commencement of his term of office is not ineligible within the meaning of the law. The opinion in *Brown v. Goben* was written by Judge Elliott, who took occasion to say that while the court adhered to the rule announced in *Smith v. Moore* and later cases, that the cause which disqualifies must exist at the time the claimant's term begins, and that his right is not affected by the fact that at the time of his election he was ineligible, that further investigation had strengthened his conviction that these cases were erroneous.

In *Shuck v. State* the rule announced in *Smith v. Moore* was reaffirmed. In *Bradfield v. Avery* it was held that when the word "eligibility" is used in connection with an office and there are no explanatory words indicating that the word is used with reference to the time of election it has reference to the qualification to hold the office, rather than the qualification to be elected to the office. In that case the real question was whether one who had held a first grade certificate for the required statutory time at the beginning of the term of

county superintendent, but who had not had the certificate for the required time when elected, was eligible to the office. In *Demaree v. Scates* it was held by a divided court that the word "eligible" used in the statute had reference only to the capacity to hold office. Allen, judge, in dissenting said that in his opinion not only the weight of reason, but of authority as well, is to the effect that the word "eligible" has reference to the status of the candidate at the date of his election, when the electors make their choice; that such choice should be made from those persons then eligible, and that the electors should not be required to speculate as to whether subsequent conditions which may or may not arise would qualify the candidate to hold the office.

In *Kirkpatrick v. Brownfield* it was ruled that the word "eligible," as used in the constitution, signifies eligible to hold office. The court was, however, influenced by the fact that the constitution used the words "eligible to election" and "eligible to office," and concluded that the change in phraseology was not the result of mere chance. In *State v. Van Beek*, it was held by a divided court that one who was an alien at the time of his election and consequently ineligible to hold office, could remove the disability by being naturalized before his induction into office. The chief justice in dissenting construed the word eligible to mean eligible to hold office at the time of the election.

It is a cardinal rule of construction that the words of a statute or of a constitution should be so construed as to effectuate the purpose and intent of the lawmakers, hence that construction should be adopted which will best subserve the general purpose for which the law was written. The view we have taken, we think, not only catches the intent and spirit of the constitution, but is withal a wholesome view, for as Judge Elliott said in dissenting in *Smith v. Moore*, "judges ought not to be allowed to be scramblers for political places." The writ is granted.

Mount, C. J., Parker, Ellis, and Main, JJ., concur.

CHADWICK, J. (concurring)—I would have some hesitation in speaking to the question before the court, for my views have been to some extent made public in the conduct of my personal affairs, but the main opinion having been signed by a majority of the court, I see no impropriety in adding a few words.

Judge Gose says:

"It was conceded at the bar, and it cannot be doubted, that a judge cannot qualify himself to hold an office other than a judicial one during his elective term by resignation or by any other act on his part."

If the law is not so, if the spirit of the constitution is to be overcome by its alleged letter, if there is no question of public policy which controls the judicial officer for his full term, the right of resignation as well as the right to qualify after the term could not be denied; and for this reason: The only interest the public has in the office is to see that it is filled. The constitution and the statutes provide for filling vacancies. After the resignation of a judge and the vacancy is filled, no public interest remains in the individual. The public cares not whether an office is filled by A or B so long as it is duly administered. Then why can a judicial officer not run for a political office? The answer is to be found in the constitution. Its spirit, and I think its letter, is that a judicial officer assents when he comes to the office that, for the term prescribed in his certificate of election, he will divorce himself from political activities.

To give the constitution any other meaning would defeat its purpose entirely. For instance: A is elected to a judicial position for a four-year term. During the first two years of his incumbency he could not run for a political office, but immediately upon the passing of a biennial election he might become an active agent in the general politics of the state for the reason that his term would expire before he assumed the office to which he aspired. The construction of the minority would keep a judge inactive for the half or two-

thirds of his term and leave him free to promote his ambitions for the last two years of his term. Such was not the purpose of the constitution. To state any one of many possible cases meets the whole argument, and leaves the spirit of the fundamental law unimpaired and undimmed. A judge is not elected for four years, but for a term of four years and until his successor is elected and qualified. Suppose no successor is elected to succeed Judge Black, or, being elected, does not qualify until after the term of governor commences. The judge could not qualify, for the reason that his term would be continuing. Nor could he, under the very letter of the law, resign to take a political office. This is admitted by all. Hence, although elected he would not be free to assume the duties of his office; nor could he qualify himself by resignation, for the reason that he was disqualified at the time the term of the other office began. In many of the cases relied on by respondent, and others that might be mentioned, it has been held that statutes providing that a person shall not be eligible unless over the age of twenty-one, or unless he have a certificate of proficiency in his profession, will not disqualify the person if the disability be removed before the term begins. These decisions are sound; the spirit of the law is not broken but enforced. But here the question of eligibility goes not to personal qualifications, but the officer is barred by his present office or environment. The spirit of the law is enforced in both cases.

Office holding is a privilege and not a right, and it is well within the power of the people to insist that one who accepts a commission for a definite term shall forfeit the right to publicly aspire to any other office, or an office of a different character, not while he remains an incumbent, but for a definite time. The constitutional provision was written, not to protect the office for it needs no protection, but to restrain the man. If it is not so accepted, it serves no purpose and had better have been omitted entirely.

MORRIS, J., concurs with CHADWICK. J.

Crow, J. (dissenting)—I am unable to concur in the conclusion reached by the majority. The words of art. 4, § 15, of the state constitution are so plain and simple that no necessity exists for the elaborate argument to which resort is made in support of the construction announced in the majority opinion. It is conceded that Judge Black's present term will expire on January 13, 1913, and that the next gubernatorial term will not commence until January 15, 1913. The constitution reads:

"The judges of the supreme court and the judges of the superior court shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected."

These words clearly and concisely say "ineligible *to any other office;*" not ineligible to be a candidate or to be elected. As suggested in the majority opinion, "there were lawyers of great learning, experience and ability in the convention that framed our constitution," and it would seem that an intention to prohibit judges from being candidates for nonjudicial offices during their judicial terms could have been easily stated at the instance of the eminent lawyers, by the use of such words as "ineligible to be elected" or "ineligible to be a candidate." But no such words were used. As a matter of ethics, I heartily concur in the wholesome idea expressed in the majority opinion, that no judge should under any circumstances become a candidate for, or campaign for, any nonjudicial office while serving as a judge or during his term as judge. But I am unable to conclude that such views should lead me into the position of placing the construction on the constitution which the majority have adopted.

In *Bradfield v. Avery*, 16 Idaho 769, 102 Pac. 687, 23 L. R. A. (N. S.) 1228, the court announces a view contrary to that announced in the majority and the concurring opinion. While it is true that Judge Gose seeks to distinguish this case and others cited by counsel for defendants, it seems to me that the reasoning of the Idaho court is convincing. In

a notation to this case as reported in 23 L. R. A. (N. S.) 1228, the annotator says:

"The cases discussing this question are quite evenly divided, and while perhaps the majority are in accord with *Bradfield v. Avery*, there is considerable authority to the contrary. The question has arisen most frequently under statutory or constitutional provisions using the word 'eligible' in connection with certain qualifications or disqualifications for public office. That such a provision relates to the time of taking office, instead of the election or appointment, was held in the following cases: *State ex rel. Thornburg v. Huegle*, 135 Iowa 100, 112 N. W. 234; *People v. Hamilton*, 24 Ill. App. 609; *Hoy v. State*, 168 Ind. 506, 81 N. E. 509, 11 A. & E. Ann. Cas. 944; *Brown v. Goben*, 122 Ind. 113, 23 N. E. 519; *Shuck v. State*, 136 Ind. 63, 35 N. E. 993; *Demaree v. Scates*, 50 Kan. 275, 20 L. R. A. 97, 34 Am. St. Rep. 113, 32 Pac. 1123; *Kirkpatrick v. Brownfield*, 97 Ky. 558, 29 L. R. A. 703, 53 Am. St. Rep. 422, 31 S. W. 137; *State ex rel. Broatch v. Moores*, 52 Neb. 770, 73 N. W. 299."

I think the doctrine announced in the cases cited by the annotator should be controlling here.

The writ should be denied. I therefore dissent.

FULLERTON, J., concurs with CROW, J.

[No. 10363. Department Two. October 14, 1912.]

W. M. MEACHAM *et al.*, *Respondents*, v. HANS PEDERSON, *Appellant*.[1]

CONTRACTS—BUILDING CONTRACTS—ASSENT—CONSIDERATION — EVIDENCE—SUFFICIENCY. The evidence is insufficient to sustain a verdict to the effect that a contract was entered into whereby the defendant, a general contractor, was to sublet to the plaintiff a part of contemplated city work, provided he obtained the city contract in consideration of the plaintiff's making an estimate on that part of the work, where it appears that the plaintiff's estimate was largely in excess of the limit fixed by the city, it was not shown that

[1]Reported in 127 Pac. 114.

the defendant used the estimate and it was customary for subcontractors to furnish such estimates and there was no other consideration for the contract.

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 19, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Reversed.

Tucker & Hyland, for appellant.

Preston & Thorgrimson, for respondents.

MOUNT, C. J.—This action was brought by the plaintiffs to recover damages for the breach of an alleged contract. The defendant denied that any contract had been entered into with plaintiffs. The case was tried to the court and a jury. After the evidence for the plaintiffs was in, defendant moved the court to take the case from the jury and enter judgment for the defendant. This motion was denied. The evidence for the defendant was then heard, and at the close of all of the evidence, the defendant moved the court for a directed verdict. This motion was also denied. The jury returned a verdict for the plaintiffs. The defendant has appealed.

It appears that the city of Tacoma was about to let a contract for the construction of the Nisqually power plant, an electric plant to be built by the city. This work was estimated to cost more than a million dollars. It was divided into eight sections. One section of the work consisted of a transmission line from LaGrande to Tacoma, a distance of about thirty miles. The defendant was a general contractor, and was intending to bid upon the contract as a whole, which he did. The contract was awarded to him. The plaintiffs testified in substance that, prior to the time the contract was let by the city of Tacoma to defendant, they had an agreement with the defendant, to the effect that they would furnish to the defendant figures showing the cost of the various items included in section 8 of the contract, and also what the construction of that section would cost; that the defendant would

use this estimate upon that section in making his bid for the whole work, and that if the contract were awarded to the defendant, he would sublet section 8 to them at the figures furnished; that they did furnish the figures and estimate as agreed, and that the contract was awarded to defendant, who thereafter refused to let the work upon section 8 to them. They claim damages in a large sum.

We are convinced that the evidence on behalf of the plaintiffs was not sufficient to sustain a verdict to the effect that a contract was made and entered into. It was not claimed that the plaintiffs were copartners with the defendant, or that they were to have any interest in the general contract. Their only claim was that defendant had agreed to sublet section 8 to them, provided he obtained the contract. The consideration was that they should estimate the cost of section 8 of the contract, and that this estimate would be the basis of the bids of the defendant upon the whole contract. They testified that they did make this estimate, but it was not shown that the estimate was used. It is conceded that this estimate was about $30,000 more than the limit fixed by the city of Tacoma in the call for bids upon section 8 of the contract, and that the bid put in by the defendant was lower than the limit fixed by the city in its call for bids upon this section. Plaintiffs sought to explain this by saying that the limits fixed on other sections of the work were high enough so that the excess limit on section 8 as made by them might be apportioned to other sections; that this method of bidding was adopted by the defendant. It was not claimed that the plaintiffs were original bidders for the work, but it was conceded that they could not enter into that contract, and that they sought only section 8 of the work, and this was to be sublet to them by the defendant after the whole contract was awarded.

Plaintiffs also testified that, in order to make this estimate, they went over the ground upon which the transmission line was to be constructed and observed the character of the soil

and the cost of the poles and other materials, and that this was necessary in order to determine the estimate. They also admitted that this was ordinarily done when bidding upon a subcontract, and that it was usual for intending subcontractors to furnish estimates upon portions of the work to a general contractor prior to the bidding upon the general contract. No other consideration for the contract was proved, or attempted to be proved. The whole testimony of the plaintiffs convinces us that the parties were simply negotiating for a contract, and never went beyond that stage; that no agreement was ever reached, and that no contract was ever entered into. The utmost which can be reasonably claimed from the evidence is that the parties intended to enter into a subcontract which should be reduced to writing when the terms were later agreed upon. An action can be based only upon a completed contract. *McDonnell v. Coeur d'Alene Lumber Co.*, 56 Wash. 495, 106 Pac. 135, 26 L. R. A. (N. S.) 222.

It follows that the trial court should have sustained the defendant's motion. The judgment is reversed, and the cause ordered dismissed.

FULLERTON, CHADWICK, CROW, and ELLIS, JJ., concur.

[No. 10386. Department One. October 14, 1912.]

GEORGE W. MERRILL, *Respondent*, v. CARO INVESTMENT COMPANY, *Appellant*.[1]

PARTNERSHIP — ASSUMED OR FIRM NAME — FILING CERTIFICATE — STATUTES — SCOPE OF ACT. A person conducting a business in which he alone is interested, in the name of a company containing his full name, is exempt from filing with the county clerk the designation of the firm with the true and real names of all persons conducting the business or having an interest therein, pursuant to Rem. & Bal. Code, § 8369, by Id. § 8372, providing that nothing in the act shall prevent the lawful use of a partnership designation if the same includes the true and real name or names of all the parties conducting such business or having an interest therein.

[1]Reported in 127 Pac. 122.

Corporations—Representation—Acts of Officers—Contracts—Question for Jury. A *prima facie* case of authority of the president of a corporation to hire automobiles is established, where the company owned a platted addition where it was selling lots, and the principal use of the automobiles was to carry prospective purchasers from the city to the addition to inspect lots.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 1, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Davis & Rhodes, for appellant.

W. J. Matthews, for respondent.

Crow, J.—This action was commenced by George W. Merrill against Caro Investment Company, a corporation, to recover for automobile hire. From a verdict and judgment in plaintiff's favor, the defendant has appealed.

Respondent, George W. Merrill, alleged that, at all times in the complaint mentioned, he was engaged in the business of keeping automobiles for hire, in the city of Spokane, under the firm name and style of George W. Merrill Automobile Company, but he did not allege or prove that he had filed a certificate in the office of the clerk of Spokane county, setting forth the designated name or style under which his business was conducted, with the true name or names of the parties conducting the same or having an interest therein. By demurrer and answer, appellant questioned respondent's capacity to sue, and now contends that this action should have been dismissed, for the reason that respondent failed to file the certificate above mentioned; that the filing of such a certificate is required by § 1, ch. 145, Laws 1907, p. 288 (Rem. & Bal. Code, § 8369), and that, under § 5 of the act, p. 290 (Rem. & Bal. Code, § 8373), respondent has no capacity to sue. Sections 1 and 4 of the act (Rem. & Bal. Code, §§ 8369, 8372), in so far as material to the present inquiry, read as follows:

"Sec. 1. No person or persons shall hereafter carry on, conduct or transact business in this state under any assumed name or under any designation, name or style, corporate or otherwise, other than the true and real name or names of the person or persons conducting such business or having an interest therein, unless such person, or all of such persons, conducting said business, or having an interest therein, shall file a certificate in the office of the county clerk of the county or counties in which said business is to be conducted, which certificate shall set forth the designation, name or style under which said business is to be conducted, and the true and real name or names of the party or parties conducting, or intending to conduct, the same, or having an interest therein, together with the postoffice address or addresses of said person or persons . . ." Rem. & Bal. Code, § 8369.

"Sec. 4. . . . nor shall this act be deemed or construed to prevent the lawful use of a partnership designation, name or style: *Provided*, that such partnership designation, name or style shall include the true and real name or names of all of the parties conducting such business or having an interest therein . . ." Rem. & Bal. Code, § 8372.

In *Sutton & Co. v. Coast Trading Co.*, 49 Wash. 694, 96 Pac. 428, this court held that inasmuch as this statute affects the common law right to contract, implications against the common law privilege to contract should not be favored. In *Malfa v. Crisp*, 52 Wash. 509, 100 Pac. 1012, the statute was liberally construed, and we held that the filing of the certificate, after the commencement of action but prior to the trial, was sufficient. In *Bowman v. Harrison*, 59 Wash. 56, 109 Pac. 192, where the record shows that the action was commenced by William Bowman and Oscar Collins, copartners under the firm name of Bowman & Collins, the plaintiff's right to sue was sustained; and in *Hale v. City Cab, Carriage & Transfer Co.*, 66 Wash. 459, 119 Pac. 837, it was held that "Hale-Tindall Co.," the plaintiffs' partnership designation, which contained the surnames of all the partners, was sufficient as falling within the proviso of § 4 of the act (Rem. & Bal. Code, § 8372). Respondent's full, true, and real name appears in the designation "George W. Merrill Automobile

Company," under which he alone conducted the business of keeping automobiles for hire. This being true, we find no merit in appellant's contention that he cannot maintain the action.

Appellant's next assignment involves the contention that the evidence is not sufficient to sustain the verdict and judgment. No good purpose would be served by repeating the evidence. Counsel earnestly contend that the automobiles were hired by one Kenyon for his personal use, although he was at the time conceded to be the president of the appellant corporation. The evidence was conflicting, and we conclude it was sufficient to sustain the verdict. The principal issue of fact was whether Kenyon, as president, was authorized to hire, and did hire, the automobiles for appellant. Appellant insists that his authority has not been proven. It was shown that he was president of the corporation; that the corporation owned a platted addition near Spokane, where it was selling lots; that the principal use which was made of the hired automobiles was to carry prospective purchasers from the city, or from the end of a street car line, to the addition, so that they might inspect the lots and meet Kenyon, who was making sales. These facts were sufficient to make at least a *prima facie* showing of authority, and it was for the jury to determine whether such showing was overcome by evidence introduced by appellant. The weight of the evidence, rather than its sufficiency, is involved in the contentions made, but its weight was for the exclusive consideration of the jury.

Exceptions are taken to rulings on the admissibility of evidence and to instructions given and refused. We find no error in this regard. Rulings on evidence were correctly made, and the instructions given not only stated the issues and the law concisely, clearly, and properly, but also covered in appropriate form all requested instructions to which the appellant was entitled. The judgment is affirmed.

Parker, Gose, Morris, and Chadwick, JJ., concur.

[No. 9969. Department One. October 14, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Lyle Light, Power & Water Company, Plaintiff*, v. THE SUPERIOR COURT FOR KLICKITAT COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN—PUBLIC USE—FUTURE AND PRESENT NEEDS—SURPLUS POWER—PRIVATE USE. A power and water company may condemn property for the public purposes of municipal lighting and of electric railways, notwithstanding it seeks to avail itself of Rem. & Bal. Code, § 4974, granting it the right to use for private purposes electricity generated for public purposes if at any time there should be a surplus of power not needed for public purposes; since it may anticipate future as well as present public needs, where it acts in good faith and seeks no excessive or unreasonable appropriation.

SAME—PUBLIC USE—SURPLUS POWER—EVIDENCE—SUFFICIENCY. Sufficient public necessity for condemnation is shown where an electric light and power company having agreed to furnish power to a town and an electric railway company, and contemplating other contracts for power for public purposes only, sought to condemn to develop ten thousand horse power, although but a small part of such power was needed for the contracts already secured.

Certiorari to review a judgment of the superior court for Klickitat county, McKenney, J., entered October 4, 1911, adjudging a public use and necessity, in proceedings to condemn land for an electric power plant. Affirmed.

W. G. Drowley (*R. Sleight*, of counsel), for relator.

Williams, Wood & Linthicum and *N. B. Brooks* (*Erskine Wood* and *M. M. Matthiessen*, of counsel on the brief), for respondent Northwestern Electric Company.

CROW, J.—The Northwestern Electric Company, a public service corporation, as petitioner, instituted an action in the superior court of Klickitat county against Lyle Light, Power & Water Company, also a public service corporation, and other claimants, to condemn and appropriate a strip of land

[1]Reported in 127 Pac. 104.

about 300 feet in width and 1,200 feet in length, at first along the westerly bank of the Klickitat river, and thereafter crossing the river and upon its easterly bank, for the purpose of constructing a flume and other works which it is alleged are necessary to the installation and maintenance of an electric plant for generating light and power for public uses. The trial court adjudged the taking of the property to be necessary, and that the uses to which the petitioner intends to devote the same are public. Upon the application of Lyle Light, Power & Water Company as relator, the cause was thereupon transferred to this court by writ of certiorari for a review of the order thus made.

Relator contends that the articles of incorporation of the respondent Northwestern Electric Company do not authorize it to appropriate property by an exercise of the right of eminent domain, as such articles do not meet the requirements of § 1, ch. 151, Laws 1907, page 349 (Rem. & Bal. Code, § 4974), under which section relator insists respondent is proceeding and must proceed. The objects and purposes for which the respondent has been organized, as disclosed by its articles of incorporation, are diverse, some being of a public and others of a private nature. Its objects pertaining to the public service, as stated in the articles, in part are:

"(1) To develop, generate and furnish electricity for the purposes of supplying cities, towns, villages, municipal corporations, communities and the inhabitants thereof, with light and with electricity for lighting purposes.

"(2) To develop, generate and furnish electricity for the purpose of supplying cities, towns, muncipal corporations and communities with heat, and with power for heating purposes.

"(3) To develop, generate and furnish electricity for the purpose of supplying heat, light or power to any public corporation for any public purpose or public use whatsoever.

"(4) To supply cities, towns, villages, communities, municipal and other public corporations, and the inhabitants thereof, with light, and to utilize electricity for any public use, including heating, lighting and power.

"(5) To develop, generate and furnish electricity for any public use.

"(6) To supply cities, towns, villages, communities, municipal and other public corporations, and the inhabitants thereof, with gas for lighting or for any other purpose which is or will be a public use.

"(7) To supply cities, towns, villages and communities, municipal corporations, and the inhabitants thereof, with water, and for any such purpose to purchase or otherwise acquire, erect, own and operate water works.

"(8) In respect to all or any of the foregoing purposes, to discharge all the duties of a public service corporation, and to receive tolls and compensation in respect to all or any of such purposes, all subject to such regulations as may now or hereafter be prescribed by law. . . . "

Respondent contends, (1) that it is not compelled to rely upon the act of 1907 for its right to condemn; (2) that it only seeks to avail itself of the incidental authority conferred by that statute, so that it may sell for private use such surplus power as it may generate and not need for public purposes; and (3) that by subdivision 8 of the objects above quoted from its articles of incorporation, it has substantially complied with the requirements of the act. We think these contentions must be sustained. Prior to the enactment of the law of 1907, this court held that, when the purposes of a corporation are both public and private, and it seeks condemnation for public purposes only, its power to exercise the right of eminent domain will be sustained, and that if it should thereafter attempt to use for private purposes the property taken, the right and authority to prevent such an abuse or wrongful act rests in the supervising and controlling power of the state. *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198. In the case cited we said:

"But while the exercise of this right of eminent domain must be guarded jealously, so that the private property of one person may not be taken for the private use of another, after all is said and done, the power to prevent property

taken for a public use from being subsequently diverted to a private use must rest rather in the supervisory control of the state than in caution in permitting the exercise of the power. Property taken for a public use by a corporation organized solely to promote a public business may be as easily diverted by it to a private use, as it may by one having both public and private objects. It is not the object for which a corporation is formed that prevents it from wrongdoing. The preventive rests in the power of the state to compel it to lawfully exercise its granted privileges."

After the enactment of the statute of 1907, this court, in *State ex rel. Dominick v. Superior Court*, 52 Wash. 196, 100 Pac. 317, 21 L. R. A. (N. S.) 448, held that, when a corporation in good faith seeks to condemn property for the public uses of municipal lighting and of electric railways, and seeks to avail itself of the provisions of the act of 1907, granting it the right to use for private purposes electricity generated for public purposes and not needed therefor, condemnation for the public purposes will be allowed irrespective of the provisions of the act. As we understand respondent's position, it in good faith seeks condemnation in order that it may generate and sell power for public uses only; but if at any time there should be a surplus of the power thus generated, it further desires to devote that surplus to private uses rather than permit its waste until such time as it may be needed for public uses only. This court, in *Dominick v. Superior Court*, *supra*, after quoting § 1 of the Laws of 1907, p. 349, observed:

"It is questionable whether the legislature intended by this act to merely enlarge or extend the uses that might be made of electricity generated for public purposes and not needed therefor, or whether it intended to enlarge the power of eminent domain itself. If the former was intended, the act would seem to be entirely free from constitutional objection, while in the latter case the validity of the act would be very questionable, under previous rulings of this court. But we do not feel called upon to determine that question in this case, for it does not appear that the respondent is at-

tempting to acquire any property by virtue of the provisions of the act of 1907. It simply seeks to avail itself of the provisions of that act in order that it may use electricity generated for public purposes and not needed therefor, in the manner therein provided."

The legislature could not declare that any particular use is or is not public, that being a judicial question under § 16, art. 1, of the constitution. The only valid purpose of the statute was to confer upon the public service corporations mentioned temporary or incidental authority to devote to private uses any excess electric power generated in good faith for public uses but not needed therefor, and which would otherwise go to waste. The statute does not confer, nor could it confer, upon any public service corporation the right to condemn property for private purposes. It is manifest that any public service corporation, when installing an electric plant, must anticipate future as well as present needs of the public, and it may condemn private property with such future needs in view. If this could not be done, the logical result would be that, every time it secured additional public service contracts or was called upon to furnish additional power for an undoubted public use, it would be compelled to institute further condemnation proceedings, acquire additional property, enlarge its plant, increase its output, and thus meet the increased demands for public use. That such a procedure would be unbusinesslike and impracticable was recognized in *Tacoma v. Nisqually Power Company*, 57 Wash. 420, 107 Pac. 199, where we said:

"The supreme court of the United States, while strictly adhering to the rule that private property may not be taken for private use, sees nothing objectionable in permitting the state of Wisconsin, which under legislative act reserved to itself the water power created by a dam over the Fox river, to dispose of some of its surplus water for private use, as there was no need of such surplus water running to waste and the state might thus reimburse itself for the expense of the improvement. *Kaukauna Water Power Co. v. Green Bay & M.*

Canal Co., 142 U. S. 254. In the note to *Wisconsin River Improvement Co. v. Pier* (137 Wis. 325, 118 N. W. 857), 21 L. R. A. (N. S.) 538, at page 548, it is said in speaking of this incidental private use: "The principle that an incidental private use will not defeat the exercise of the power of eminent domain is also to be found stated in many cases not falling within the scope of this note, for the reason that the incidental private use, so called, was merely the prospective enjoyment of the same character by a private individual, but in a greater degree than the general public, and not the enjoyment of a use distinct from that which the public could share.' In the *Harris* case, *supra* [42 Wash. 660], in which this court withheld the power of eminent domain, it was shown that the power was required to furnish lights to the cities of Olympia and Tumwater, to run electric cars between those two cities, and also to sell power to manufactories. Here there was a manifest combination of public and private use, and both uses were principal uses. In the case before us now, it is apparent from the evidence, which must be the controlling feature, that the city's need of the power it seeks is a strictly municipal and public use, and that it is not seeking in its requirement of 20,000 horsepower, more than it will in the near future be required for a purely public use. And if in the meantime, or during the time when it does not require its peak load for its public use, it permits such uses as the evidence shows it now does, such use is so insignificant and so purely incidental that it will not defeat the right to condemn for the public use."

It is the duty of the courts to see that private property is not taken for private uses, and that no excessive or unreasonable appropriation is made for public uses. Public service corporations seeking to exercise the right of eminent domain must proceed in good faith, as they will not be permitted to condemn private property for private uses under the pretense that it is being taken for public uses. Yet property sufficient to meet prospective public needs can and may be taken.

The relator insists that the evidence shows a lack of public necessity for the property sought to be taken, and that it is not being taken for a public use. We have examined the evidence with much care and conclude these contentions can-

not be sustained. It already appears that respondent has a contract and franchise by which it has agreed to furnish power for public use to the town of Camas, and that it has agreed to furnish power to an electric public service railroad about to be constructed. It is seeking to develop ten thousand horse power, and contemplates the procuring of other contracts for the transmission of such power to various localities, to be devoted to public uses only. Relator insists that the amount now sought to be appropriated is largely in excess of present or prospective public need or demand. It lays stress upon the fact that the only contracts respondent now has are the ones above mentioned, which it says will require but a small amount of power. We fail to see the force of this argument. No company can obligate itself to furnish power until it has acquired the necessary property which will enable it to perform its agreements. Relator's position seems to be that a public service corporation, in advance of actual condemnation, must contract power for public uses as a condition precedent to its right to condemn. No corporation could safely do so. It is needful that it first acquire the property in order that it may contract with ability to perform. The petition avers, and the testimony shows, that the uses sought to be served by respondent and for which the property is sought to be taken are public. This being true, the condemnation should be permitted in anticipation of public service contracts which will be entered into later. If, after respondent has acquired the power for a public use, it should abuse its privileges, or refuse to proceed in good faith, the remedy is in state control. *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co., supra.*

We are unable to conclude from the evidence that the property is sought to be taken by respondent for private uses, in violation of the constitution or any statute of this state.

The relator insists that it is a public service corporation, that it has devoted the property to a prior public use, and that respondent cannot condemn the same. This statement

is not sustained by the evidence. We are unable to find that the property has already been devoted to a public use.

The judgment is affirmed.

FULLERTON, GOSE, CHADWICK, and PARKER, JJ., concur.

[No. 9981. Department Two. October 14, 1912.]

A. L. OLSEN, *Appellant*, v. NORTHERN STEAMSHIP COMPANY, *Respondent*.[1]

CORPORATIONS — STOCK — SALE — OPTION TO RESELL — TIME AND METHOD OF EXERCISE. An agreement providing that, in case plaintiff should be discharged from defendant's employ, the defendant would, within six months thereafter, at plaintiff's option, take redelivery of defendant's corporate stock purchased by plaintiff, and repay plaintiff par therefor, fixes an option for a fixed period which must be exercised within the six months by redelivery of the stock, and it is not sufficient that notice of election to redeliver, with a demand, was made by letter posted within the time limit.

SAME—OPTION—TENDER—WAIVER. Failure to answer a letter giving notice of an election to exercise an option to redeliver stock, posted on the last day of the option period, does not constitute a waiver of the failure to tender the stock as required by the option, where the letter was not received until the option period had expired.

SALES—ULTRA VIRES ACTS—REPURCHASE OF STOCK. If a sale of stock to a corporate employee, with an agreement by the corporation to repurchase its own stock in case of discharge, was *ultra vires*, it was divisible, and not being void *in toto*, the sale was absolute.

Appeal from a judgment of the superior court for King county, Prigmore, J., entered July 1, 1911, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

William H. Gorham and *Samuel H. Piles*, for appellant.

Bridges & Bruener (*Trefethen & Grinstead*, of counsel), for respondent.

[1]Reported in 127 Pac. 112.

ELLIS, J.—In this action the plaintiff sought to recover the money paid for twenty-five shares of the increased capital stock of the defendant corporation, of a par value of $100 per share. The facts necessary to a proper determination of the action, as we view them, are few, admitted, and uninvolved. In April, 1909, the defendant sold and delivered to the plaintiff twenty-five shares of its increased capital stock for $2,500 cash, upon the following considerations, as found by the court without exception on either side:

"(1) That the defendant company should employ plaintiff as master mariner of the steamer A. G. Lindsay owned by defendant, at a salary of $200 per month; one-half pay if the vessel should be laid up for repairs; (2) that should plaintiff be discharged as master of said steamer by defendant company, the defendant would, within six months after said discharge, at plaintiff's option, take redelivery of said shares and repay plaintiff the par value thereof."

The plaintiff was at once employed and entered upon his duties as master pursuant to the agreement, and so continued until December 18, 1909, when at his own request he was temporarily laid off, and on February 24, 1910, he was discharged by the defendant. On August 24, 1910, the plaintiff mailed a letter, postage and registry fee prepaid, addressed to the president of the defendant company at Aberdeen, Washington, reading as follows:

"Six months having expired since my discharge as master of the steamship 'A. G. Lindsay,' you are hereby requested to fulfill your agreement with me to buy my twenty-five shares of the capital stock of the Northern Steamship Company at par, to wit: $2,500, delivery of which shares will be made to you at Seattle or Aberdeen, as you may designate through my bank or its correspondent, upon payment by you of $2,500 to my account. Please advise me whether you wish delivery of shares at Seattle or Aberdeen, that I may advise you in turn what bank will deliver shares upon payment of money."

This letter was received by the defendant's president on August 26, 1910. So far as the record shows, it was never

answered. On September 12, 1910, the plaintiff tendered to the defendant the twenty-five shares of stock, duly endorsed and demanded repayment of the $2,500. The defendant refused to accept the tender, and refused to make the payment. The cause was tried to the court without a jury. From a judgment of dismissal, with costs against the plaintiff, he has appealed.

The respondent contends that the contract, in so far as it provided for a redelivery of the shares and the return of the purchase price, was *ultra vires* on its part and void. We find it unnecessary, however, to discuss or decide this question, since it seems to us that the terms of the admitted agreement as found by the court make it plain that the judgment must be affirmed. The option accorded by the contract to the appellant could only be exercised by a redelivery of the shares within six months after his discharge. It was only upon and by such redelivery within that period that he could charge the respondent with any duty to accept redelivery and repay the money. The option was for a fixed period of six months, and its mode of exercise was fixed by the undertaking of respondent to "take redelivery" and repay the par value "within six months after said discharge." The agreement did not provide that the respondent would repay the money if notified within six months of appellant's election to redeliver the stock at some future time. It was not an option to elect within six months, but to redeliver within that time. The option did not contemplate a mere communicated mental election to return the stock within the time fixed. An actual redelivery or tender of redelivery was necessary. *Orvis v. Waite*, 58 Ill. App. 504; *Edgerly v. Gardner*, 9 Neb. 130, 1 N. W. 1004.

That was the only thing which would enable the respondent to take redelivery within that time as provided in the agreement. "The condition being lawful, it is not competent for the court to dispense with its performance." *Waterman v. Banks*, 144 U. S. 394, 401.

The stock itself not having been tendered within the life of the option, the option lapsed by its own terms. It is a general rule that, in case of an optional sale, where the time within which the option shall be exercised is fixed by the contract, that time is, in the very nature of the case, of the essence of the contract, unless it is waived or performance within that time is prevented by the other party. It is one of the terms of the contract. To hold otherwise would be to make a new contract for the parties. In the case before us, the option by its terms was to be exercised within the six months. The redelivery on the one hand within that time was a condition precedent to the duty to make repayment on the other.

"It may be laid down as the settled rule, that where time enters into the performance of a condition precedent, the plaintiffs must aver accordingly, unless strict performance is waived or otherwise discharged by the defendant. In case a discharge of the strict performance be relied upon, as a waiver by the defendant, it must be pleaded. The rule must apply—I can preceive no difference in the principle—to an hour as well as to a day. . . . A contract, to be performed at a given hour, must necessarily be governed by the same principles as when to be performed on a given day; the same rules of pleading and of evidence must apply to the one case, as to the other." *Shinn v. Roberts*, 20 N. J. L. 435, 446, 43 Am. Dec. 636.

See, also, *Pollock v. Riddick*, 161 Fed. 280; *Henderson v. Wheaton*, 139 Ill. 581, 28 N. E. 1100; *Dickey v. Winston Cigarette Mach. Co.*, 117 Ga. 131, 43 S. E. 493; *Orvis v. Waite, supra; Patent Title Co. v. Stratton*, 89 Fed. 174; *Waterman v. Banks, supra; Edgerly v. Gardner, supra, Kelsey v. Crowther*, 162 U. S. 404.

A mere offer to tender is not equivalent to a tender, and the person to whom it is made is not bound to say whether he will accept the money or thing until it is actually produced. 38 Cyc. 143.

"A promise to pay in chattels, or in anything of a fluctuating value, must be strictly complied with as to time, and

a tender of the thing to be paid cannot be made before or after the day fixed for payment." 38 Cyc. 148.

See, also, *Kentucky Distilleries & Warehouse Co. v. Warwick Co.*, 109 Fed. 280.

The contract here in question cannot be construed, as urged by the appellant, as a continuing offer on the respondent's part to repurchase the stock throughout the six months, which constituted a contract to repurchase upon the appellant's mailing an acceptance on the last day of that period. The agreement was not an option to enter into a contract to sell the stock, but was an option to sell the stock. *Pollock v. Riddick, supra.* The contract as a whole was an absolute sale of the stock to the appellant, if not rescinded in the manner and within the time fixed in the agreement itself, and this was wholly to be done by the appellant himself. *Henderson v. Wheaton, supra.*

From the day the agreement was made it was a complete contract irrevocably fixing the rights of each party. Their minds had met when the original agreement was made. No new contract was either contemplated or made. The appellant was given the option of redelivering the stock and receiving the money, but only within the life of the option. Having confessedly failed to tender the stock within the time fixed for its redelivery, he can no longer insist upon the right to redeliver and demand the money.

It cannot be said that the failure to answer the letter of the appellant, offering to tender the stock, was a waiver of tender by the respondent. The respondent had no chance to answer that letter within the six months. It is admitted that it was not received until two days after the option had expired. Had it been mailed in time to be answered within the life of the option, there might be some force in a claim that the failure to object or state a place of delivery was a waiver of tender within the time. As it was, there is no ground for such claim. *Pierce v. Lukens*, 144 Cal. 397, 77 Pac. 996.

We find it unnecessary to discuss the contention of the appellant that, if the contract to accept redelivery was *ultra vires*, it rendered the contract void *in toto* and he was therefore entitled to a return of his money, further than to say that, if the condition was void, it was so because its performance would be a fraud upon other stockholders and upon creditors of the respondent corporation. To hold that the contract was indivisible, and that the condition was *ultra vires* and therefore rendered the whole contract void, would be to perpetrate the very fraud upon other stockholders and creditors to avoid which is the only logical ground for the argument that the condition is *ultra vires*. On reason, therefore, as it seems to us, it must be held that, even if the condition was *ultra vires* (a thing which we do not decide), it alone was void, that the contract was divisible, and the sale absolute. *Boley v. Sonora Development Co.*, 126 Mo. App. 116, 103 S. W. 975.

The judgment is affirmed.

MOUNT, C. J., MORRIS, and FULLERTON, JJ., concur.

[No. 10362. Department Two. October 14, 1912.]

In the Matter of the Estate of WILLIAM CON BELL. W. C. BELL, JUNIOR *et al.*, *Appellants*, v. HOTEL SORRENTO *et al.*, *Respondents*.[1]

EXECUTORS AND ADMINISTRATORS—CLAIMS—ALLOWANCE TO WIDOW—PREFERRED CLAIMS. Under Rem. & Bal. Code, §§ 1466, 1467, and 1571, authorizing allowances for the support of the widow which are preferred over all claims except funeral charges and costs of administration, the court may classify and allow, as preferred, claims for caring for the widow at a hotel and hospital, doctor's and nurse's charges, and her brother's expenses in a trip from the east to care for her, where the deceased and widow were fatally injured in an accident while temporarily in the state, in view of the gravity and manifest necessities of the case.

[1]Reported in 127 Pac. 100.

SAME — ALLOWANCE TO WIDOW — PREFERRED CLAIMS — NOTICE — WAIVER — GENERAL APPEARANCE. There is a general appearance in probate, which waives jurisdictional objections to an order classifying claims and directing preferred allowances because of want of notice of final settlement provided by Rem. & Bal. Code, § 1562, where the parties had actual notice of the hearing, asked and obtained a continuance, and stipulated for a hearing at a later date, at which they had full opportunity to be heard.

SAME — CLAIMS — JURISDICTION — NOTICE — NECESSITY. The jurisdiction of the court to make allowances for the widow's support which are preferred to claims of other creditors does not depend upon the notice to all creditors required on final settlement, as against creditors who had actual notice; nor as to other persons having claims, in view of the opportunity of such claimants to be heard on final settlement.

SAME — CLAIMS — ANCILLARY ADMINISTRATION. Upon an ancillary administration in this state upon the estate of a resident of Kentucky dying in this state, the court may make allowances for the support of the widow while being cared for in this state, without having the claims passed upon by the probate court of Kentucky.

SAME — OBJECTIONS TO CLAIMS — ESTOPPEL — INCONSISTENT POSITION. Creditors filing claims in an ancillary administration in this state, and asking their allowance by the courts of this state, are estopped to question the jurisdiction of the court to classify and allow the claims filed.

Appeal from orders of the superior court for King county, Frater, J., entered February 4, and December 9, 1911, classifying and ordering paid certain claims against an estate, after hearings before the court. Affirmed.

Byers & Byers, for appellants.

Ben L. Moore, for respondent Rochester.

ELLIS, J.—In this appeal certain creditors of W. C. Bell, deceased, and the guardian of the estate of his minor son, seek a review of two orders of the superior court for King county, the first made on February 4, 1911, and the second on December 9, 1911, by which certain other claims against the estate of W. C. Bell, deceased, were classified and ordered

paid as allowances to the widow and as expenses of her last illness, during the process of administration of the estate. The facts are not disputed. The deceased and his wife, Elizabeth Young Bell, were residents of the state of Kentucky. In April, 1910, while they were temporarily in the city of Seattle, W. C. Bell was killed outright in a street car accident, and his wife received injuries from which she died in the fall of 1911, after having been taken back to her home in Kentucky.

It is admitted that, in the fall of 1910, the respondent G. A. C. Rochester was appointed by the superior court of King county administrator of the estate of W. C. Bell. The claims attacked, as improperly classified as allowances to the widow, were all for services rendered to her after her husband's death. They are as follows: After the accident, the widow was cared for at the Hotel Sorrento and Seattle General Hospital, at each of which places she remained for a considerable length of time. The claim of the Hotel Sorrento on this account was allowed for $746.75, and that of the hospital for $270.75. The respondent Arthur Young, a brother of the widow, made two trips from Kentucky to Seattle to care for his sister and her affairs and the affairs of the deceased, and his claim, for railroad fare, loss of time, and hotel bills, was allowed in the sum of $1,177.42. The claims of the respondents Dr. Davidson and Dr. Shannon were for professional services rendered to the widow during her last illness, and were allowed in the sums of $400 and $1,746.50 respectively. The claim of Louisa Laemrich was for services as a nurse, amounting to $16, and that of Frederick & Nelson for necessaries furnished in the sum of $11.69. The administrator testified that all of these claims were for necessaries and for necessary services and attention rendered and furnished during and on account of the last illness of the widow. No evidence was offered to the contrary.

The statute, Rem. & Bal. Code, § 1466, provides that, if

the property of the estate, exempt by law from execution, be not sufficient for the support of the widow and minor child or children, the court shall make such reasonable allowance out of the estate as may be necessary for the maintenance of the family according to their circumstances, during progress of settlement of the estate. By § 1467 this allowance is given preference over all other charges, except funeral charges and expenses of administration. Section 1571 makes it the duty of the administrator, as soon as he have in hand sufficient funds, to pay the funeral charges, expenses of last illness, and the allowances made to the family. Under these sections, as construed by this court in *In re Murphy's Estate*, 30 Wash. 9, 70 Pac. 109, we think the court was justified in classifying and ordering these claims paid as allowances to the widow. In that case it was held that money expended by the surviving spouse, for household and family expenses and for physicians' charges on account of the last illness and death of minor children, was properly allowed as a part of the family allowance. The statute makes no distinction as to the character of such allowance as between the widow and the minor children. The humane considerations, which are the evident basis of the statute, are as potent in the one case as in the other. Though the claims were large in amount, there is no evidence that they were exorbitant. The gravity of the widow's injuries, the long duration of her illness, her great distance from home, and the manifest necessities of her case, are sufficient to account for a large and necessary expense.

The appellants contend that the court was without jurisdiction to enter the orders, except upon the same notice as that provided in Rem. & Bal. Code, § 1562, for final settlement of administrator's accounts. The admitted facts show that, upon the presentation of these claims, the administrator petitioned the court for an order as to their classification and allowance. On the hearing of this petition, the appellants W. P. Harvey, as guardian, the First National Bank of Har-

rodsburg, and Lee Smock were represented by counsel. The claims of the other appellants had not then been filed, and these other appellants made no appearance. The first order, allowing the claims of the respondents as allowances to the widow, was entered on February 4, 1911. Afterwards, when the claims of the other appellants were presented and it became apparent that the estate would not be sufficient to pay all claims in full, the administrator again petitioned the court for an order classifying the claims and directing the payment of those of the other respondents in preference to those of the other creditors. This petition was served upon Ovid A. Byers, as guardian *ad litem* for W. C. Bell, Jr., minor heir of the deceased, and as attorney for W. P. Harvey, guardian of the estate of W. C. Bell, Jr., and as attorney for all of the other appellants, with oral notice of the time and place of hearing. On November 16, 1911, the time set for hearing, all of the appellants appeared by the attorney, Ovid A. Byers, and objected to the jurisdiction of the court for lack of sufficient notice. Without waiving this objection, their attorney requested a continuance of the hearing until he could communicate with his clients who resided in Kentucky. The continuance was accordingly granted till November 30, 1911. Thereafter it was stipulated between Ovid A. Byers, as guardian *ad litem* for the minor and as attorney for all of the other appellants, and Ben L. Moore, as attorney for the administrator, that the matter should be heard on December 9, 1911, at which time Ovid A. Byers, as guardian *ad litem* for the minor and as attorney for the other appellants, appeared and again objected to the jurisdiction. The court overruled the objection and after a full hearing of the evidence as to the claims and the circumstances under which the services were rendered to the widow, made the second order.

It is admitted that all of the appellants had actual notice of the time and place of hearing on the second petition. This accorded every advantage which notice in any form could have

given. The only purpose of notice in any case is to give an opportunity to be heard. They not only had notice, but appeared and asked for a continuance and afterwards stipulated for the hearing. We think that action must be held to constitute a general appearance to the petition, and that they were before the court for all purposes. Probate matters in this state are referred to the superior court, a court of general jurisdiction, and its jurisdiction in probate may be submitted to in the same manner and is entitled to the same presumptions in its favor as its jurisdiction in any other class of cases. As to the parties before the court, it has the same broad powers to determine the matters at issue, and its determination is entitled to the same weight as in other civil cases. *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107; *Sloan v. West*, 63 Wash. 623, 116 Pac. 272; *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492.

But it is argued that all creditors of the estate were interested, and that the court could not acquire jurisdiction to establish any claim as a preferred claim without the same notice to all claimants as required on final settlement. It is true that the supreme court of California has so held. *In re Smith's Estate*, 122 Cal. 462, 55 Pac. 249. We cannot follow that decision. It may be conceded that the order will bind no one not having notice or appearing at the hearing. But there is no more reason why persons who had actual notice and actually appeared should not be bound than would exist in any other case where the subject-matter is within the jurisdiction of a court of general jurisdiction. Other persons having claims, if there are any, are amply protected by the opportunity to be heard on the final settlement and by the bond of the administrator.

Nor do we find any merit in the contention that these claims should be submitted to the probate court of the state of Kentucky. There is no claim that this is not a proper case for ancillary administration within the state of Washington, and

there is nothing in the statutes of this state limiting the powers of the court in such a case. *Alaska Banking & Safe Deposit Company v. Noyes*, *supra*. Moreover, the appellants are estopped to object upon this ground, since they have filed their own claims in this state and asked their allowance by the administrator here.

The order appealed from is affirmed.

MOUNT, C. J., MORRIS, and FULLERTON, JJ., concur.

[No. 10002. Department Two. October 14, 1912.]

INTERNATIONAL CONTRACT COMPANY, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—PUBLIC WORKS—CONTRACT — EXTRAS—CONSTRUCTION AND OPERATION. In a contract for the construction of a concrete lining for a city reservoir, the contractor cannot recover for redressing the bottom, as an extra, where the work consisted largely of excavation, and no redressing was necessary when the contract was let, but became so by the action of the elements, and the contract provided that no claim for extras should be made for losses or damages arising from the action of the elements, and required the contractor to make such excavation as may be necessary to bring the surface to a true form and grade, to be paid for by the cubic yard as excavation, and not as redressing.

SAME—EXTRAS — SUPPLEMENTAL AGREEMENT — CONSTRUCTION AND OPERATION. Where a contract for the construction of a concrete lining for a city reservoir provided for redressing slopes only when necessary in the opinion of the city engineer, a supplemental agreement between the contractor and the city engineer by which the contractor was granted certain concessions, and redressing certain slopes was to be obviated by the filling of eroded gullies with concrete at a certain price, the supplemental agreement is a complete defense to a claim for extras in redressing the slopes, where the evidence failed to show that the city engineer had requested such redressing, but had insisted that the matter was covered by the supplemental agreement.

[1]Reported in 127 Pac. 115.

SAME—EXTRAS—ALLOWANCE. In such a case, extras cannot be allowed for excess concrete used in the sides of the slopes covered in the supplemental agreement; but should be allowed for excess concrete admittedly used in the bottom, which was not covered in the supplemental agreement.

SAME. In such a case, extras cannot be allowed for concrete placed in the bottom of the reservoir in excess of the thickness required by the contract, where the matter was in controversy and the subject of negotiations, which resulted in the acceptance of a proposition whereby the contractor was to establish a new grade, estimated by his own engineer to make the concrete of a specified average thickness, with intent thereby to avoid the redressing of the bottom and to effect a change of thickness to compensate for unevenness of the bottom, and where the city engineer's acceptance was explained by a letter of his understanding that no extra charge for concrete should be made in case the change of grade (as estimated by the contractor's engineer) increased the thickness of the concrete, which letter the contractor acknowledged to be correct.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 30, 1911, in favor of the defendant, after a hearing before the court, dismissing an action for a writ of mandate. Reversed.

Todd, Wilson & Thorgrimson, for appellant.

James E. Bradford and *Howard M. Findley*, for respondent.

ELLIS, J.—This is an action for a writ of mandate, to require the proper officers of the city of Seattle to allow and pay certain items as extras under a contract of relator with the city. The cause was tried to the court without a jury. After a full hearing upon the evidence, the court dismissed the action at the relator's costs. The relator has appealed.

On September 24, 1909, the respondent, pursuant to certain ordinances duly passed, entered into a contract with the appellant for the construction of a concrete lining for the Green Lake low service reservoir, called the "lower reservoir," and for the Green Lake intermediate service reservoir, called the "upper reservoir." The earthwork for both reservoirs had previously been performed by other

contractors under a separate contract. According to the contract here involved, the concrete lining was to consist of a bottom course or base and a top course or mortar surface. The base was to be six inches thick, and was to consist of one part cement, three parts sand, and five parts gravel, known as a 1:3:5 aggregate. The mortar surface was to be one inch thick, and consist of one part cement to one part sand, or a 1:1 aggregate. Under the contract, the total thickness of the lining would therefore be seven inches. In case of back filling made necessary by depressions or channels, the concrete filling was to be a 1:4:8 aggregate. The contract contained specific provisions for excavation, concrete filling, redressing slopes, and for extra work. These provisions were as follows:

"Excavation: The contractor shall make such excavation as may be necessary to bring the surface on which the concrete lining is to be placed to a true form and grade to receive the lining. Material necessarily excavated for this purpose shall be removed from the reservoir basin and deposited on the adjacent grounds at such locations as ordered by the engineer in charge. The price bid for excavation per cubic yard shall include excavating, loading, hauling, and dumping as above specified. Particular attention is called to the necessity of accurately finishing the surface to be concreted, and no extra yardage in concrete will be allowed for filling areas excavated below grade, unless such excavation below grade is ordered by the engineer in charge.

"Concrete Filling: When so ordered by the city engineer, channels or depressions eroded in the sides and bottoms of the reservoir basins shall be refilled with concrete which shall be mixed in the proportions of one part of cement to four parts of sand and eight parts of gravel. Concrete filling will be paid for at the rate bid therefor per cubic yard in place.

"Redressing Slopes: When it is necessary in the opinion of the city engineer to redress or repair the surface of the slopes of the reservoir it shall be done by the contractor before the concrete lining is placed thereon. Such redressing or repairing of slopes will be paid for at the rate bid therefor per square yard, such payment to be in full for performing

the work and maintaining it in condition until the concrete is placed thereon. Redressed or repaired slopes shall be in all respects as firm and true to grade as the original."

The contract also provided:

"Contractors must base their proposals on the basis of the quantities hereinafter given, but as these quantities are only approximate and not guaranteed to be correct, and intended only as a basis for the comparison of bids, payment will be made only for actual amount of work done and material furnished, whether it be more or less than the estimated amount."

The contract was let to the appellant at rates and on approximate estimates as follows: Lower reservoir concrete filling, 9,500 cubic yards, $9.08 per cubic yard; redressing slopes, 2,000 square yards, one dollar per square yard; excavation, 800 cubic yards, fifty cents per cubic yard. Upper reservoir concrete lining, 9,500 cubic yards, $9.18 per cubic yard; redressing slopes, 200 square yards, one dollar per square yard; excavation, 800 cubic yards, fifty cents per cubic yard. The appellant seeks to recover for four items of labor and material furnished in the work claimed as extras, which the respondent has refused to allow.

(1) The first item was for redressing the bottom of the upper reservoir to the extent of 23,248 square yards. The appellant claims that this was extra work for which fifteen cents a square yard was a reasonable price, at which rate this work would amount to $3,487.20. The respondent claims that this was covered by the contract as excavation. Computed as such, there were 259 cubic yards. The city paid for this at the contract rate for excavation of fifty cents per cubic yard, amounting to $129.50. The appellant, therefore, claims a balance for this item of $3,357.70. The contract must be construed with reference to the condition of the subject-matter at the time it was let. It is admitted that the contract, plans, and specifications contain no provision for redressing the bottom of either reservoir. The reason for this, as is clearly shown by the evidence, was that, at the

time the bids were called for, the bottoms of the basins were supposed to be already smooth, level, and down to grade. The evidence also shows that the reason for inserting the provision as to redressing the slopes was that the slopes of the lower reservoir, having passed through a winter after completion, were eroded, and when the contract was let in September, 1909, it was apparent that these slopes would have to be redressed before receiving the lining. The work of lining the upper reservoir was commenced by the appellant soon after the contract was let. About fourteen per cent of the bottom of this basin was completed before the work was interrupted by the winter rains, and no claim was made for redressing the bottom as to that part, nor for any redressing prior to March 1, 1910. This also tends to show that no redressing was necessary when the contract was let. The respondent claimed that, whatever redressing was done for this fourteen per cent was largely necessitated by the cutting up of the bottom by the appellant's teams being driven over it in rainy weather, and this seems to have been reluctantly conceded by the appellant. There was evidence that, when the work was resumed in the spring, the slopes had been more or less eroded; that the bottom had soft spots produced by water standing upon it; that rains and freezing had heaved the surface; and that the bottom had been to some extent disturbed by the progress of the work during rainy weather. We think that, on the evidence, the court would have been justified in finding that the leveling of the bottom was rendered necessary mainly by these causes. The contract, apparently in anticipation of such contingencies, provided:

"The contractor is to sustain, without claim against the city, all losses or damages to the work to be done under these specifications, arising from the action of the elements, or from any unforeseen obstruction or incumbrances on the line of work, which may be encountered in the prosecution of the same."

It is manifest that the appellant was not entitled to have work so necessitated treated as extra work under the contract. Much testimony of contractors and engineers was admitted on both sides as to whether the leveling of the bottom under a contract such as this should be considered as *excavation* or as *redressing*. This evidence was in direct conflict and furnishes little aid, but the provision in the contract itself under the head of "excavation," that—"The contractor shall make such excavation as may be necessary to bring the surface on which the concrete lining is to be placed to a true form and grade to receive the lining"; and the further implication that this shall be paid for at the price bid for excavating, leave little question that the removal of earth from the bottom must be classed and paid for as excavation. This would obviously also apply to the slopes, but for the specific provision and separate bid for redressing the slopes. The appellant contends that, because the estimates for excavation in the specifications were not much more than the actual excavation for ribs, talus, spillways, and sidewalks, therefore any other removal of earth should not be included in the provision for excavation. In view of the provision in the contract as to quantities, which we have quoted, and another immediately preceding the estimates, which contains the statement that it was agreed and understood "that the quantities are approximate only and for the purpose of comparing the bids on a uniform basis," this coincidence cannot be permitted to change what we think is otherwise a correct construction of the contract. We conclude, therefore, that if this leveling was required when the contract was let, it properly falls within the term "excavation," and should have been, and was, paid for as such. If it was necessitated by the action of the elements and the work of the appellant after the contract was let, then it was a risk assumed by the contractor for which no pay could be demanded. In either event, the appellant cannot complain. It was not extra work for which it was entitled to extra pay.

(2) The second item for which recovery was sought was for redressing the slopes of the upper reservoir to the extent of 12,229 square yards, at the contract rate of one dollar per square yard, amounting to $12,229. The evidence, as we have seen, shows that, at the time the contract was let, the slopes of this upper basin were in condition to receive the lining with little or no redressing. By the spring of 1910, when work was resumed, they had become considerably eroded. The contract provided that no concrete should be laid in freezing weather, or on a soft or muddy foundation, or in rainy weather, unless properly protected by the contractor. When the work was resumed in March, the question arose as to whether it would be most expeditious to redress the slopes, or fill the gullies with a concrete mixture and leave the banks alone. There was evidence tending to show that any disturbance of the surface created more washing, and a soft, wet surface upon which concrete could not be safely laid. A supplemental agreement was finally made, adopting the latter plan, as evidenced by letters in the record. The appellant, being desirous of proceeding with the work without delay, made a written offer to the city engineer as follows:

"We will put this filling in, free of cost to the city, and assume responsibility for future washing out, on the basis of the following concessions to be made us: that all the base shall be put in on the slopes and bottom in the proportion of 1-3-6, assuming a barrel of cement to be 3.5 cubic feet, as stated in the specifications, and the concrete to be proportionate in the ratio of 1.03 barrels of cement, 10.8 cubic feet of sand, and 21.6 cubic feet of gravel, the top to be in the proportion of 1-1½ or 11.9 cubic feet of cement to 17.8 cubic feet of sand. The above is also made with the understanding that the grade on the bottom and on the sides will be lowered an inch or more in order that the flat surfaces will not require more than six inches of base. This will, of course, save the city the expense of paying us for back filling, and place the concrete on solid instead of tamped earth. The ribs are to be put in exactly the same size as before, with the

proportion of 1-3-6, as above, you to pay us for excavation and yardage of these. Should you wish to change the size of the ribs, kindly let us know at once."

The city engineer answered, accepting this offer with the understanding "that the quantities for which payment is to be made are to be computed as though the lining were seven inches thick over the surface of the reservoir, and that no account is to be taken of the concrete which is necessarily used to fill the gullies eroded in the sides of the reservoir basin; that the ribs are to be measured as though they were 4″ x 8″ in cross-section; that the earth which has washed from the slopes is to be removed by you without cost to the city." This supplemental agreement cheapened both the base and the mortar surface, by requiring less cement, as the evidence shows, to the extent of 2-10 of a barrel to each cubic yard of concrete. The very purpose of the agreement was to avoid the necessity and consequent delay to the appellant of redressing the slopes on the one hand, and the expense to the city of redressing the slopes on the other. The contract, it will be remembered, provided for redressing only when necessary in the opinion of the city engineer.

While there was much testimony that the slopes were redressed to the extent claimed, there was no sufficient proof that this was ordered by the city engineer. Both the president of the appellant and its foreman testified that they were required (the inference being by some one representing the city) to remove the surface of the slopes with pick and shovel from an inch to in some places four or five inches. On the other hand, the city engineer testified that, under the supplemental agreement, "they were to proceed with the work and to fill the gullies, which had eroded, with concrete at a given price, and no instructions were given and no requirements made that they should dress the slopes." The engineer in direct charge of the work for the city, and who reported directly to the city engineer, also testified that neither he nor any of his assistants that he knew of ever gave any order

to redress the slopes. The city engineer, however, learned that the redressing was being done, since, on April 25, 1910, the president of the appellant company wrote to him that the appellant would run behind to the extent of $6,000 or $7,000 for resurfacing the slopes and bottom, and stated:

"This can in no way be interpreted to be covered by our figure for excavation, and you would doubtless feel injured if we tried to apply our figure of one dollar per square yard which was intended to cover the resurfacing of the slopes in the lower reservoir. We would therefore ask that we be allowed fifteen cents per square yard for this resurfacing from the time we began work this spring, which will amount to about 9,000 yards on the slopes and about 20,000 yards on the bottom."

The city engineer, as he testified, after looking over the work, answered this letter on May 12, as follows:

"As to the slopes, the work you are doing is certainly covered by the agreement entered into under the date of March 22, in my letter accepting your proposition of March 21; as you know, you were granted a concession in the amount of cement used, which amounts to about 2-10 of a barrel to each cubic yard of concrete, and this concession is being applied to the bottom as well as the slopes of the reservoir."

In view of these facts, it is evident that both parties recognized that they were then proceeding under the supplemental agreement which had superseded the original contract as to this resurfacing. In fact, the appellant seems to concede that the contract price of one dollar per square yard was originally intended to apply only to the slopes of the lower reservoir. This is further supported by the testimony of the appellant's president that the bid was unbalanced, in that it was higher for the redressing and lower for the concrete in the lower reservoir. The contractor, having received the benefit of the supplemental agreement by a cheapening of the mixture throughout, cannot dispute this. Having received the consideration moving to it in the cheapening of the mixture, the defendant cannot question the right of the city

to the consideration moving to it, viz., the saving of the cost of redressing the slopes. Under the supplemental agreement it received pay at the contract price for a lining of seven inches thick, no matter how much thicker it actually might be in places on account of erosion of the slopes, and manifestly some material was saved by the partial redressing of the slopes. On the conflicting evidence, we cannot say that the redressing was ordered by the city engineer. We are unable to find that the court erred in refusing to allow this item.

(3) The third item was for 585.5 cubic yards of concrete which it is claimed was used upon the sides and bottom of the upper reservoir in excess of the seven inches agreed upon in the contract. This, at the contract rate of $9.18 per cubic yard, amounts to $5,374.89. It is clear that, under the supplemental agreement, there can be no recovery for excess concrete used on the slopes. The only specific estimate which we have been able to find relating to the bottom of the reservoir alone is one made by the engineer of the appellant from condemned slabs removed from the bottom. He placed the amount of excess concrete used in the bottom at 504.5 cubic yards. Since the respondent offered no evidence in contradiction of this, we will assume that it is approximately correct. The respondent claims that, under the supplemental agreement, the appellant was not entitled to pay for excess concrete, whether placed on the slopes or on the bottom. A reading of the correspondence which we have quoted constituting this agreement is a sufficient answer to this contention. That agreement was manifestly intended to apply only to the excess concrete used on the slopes. The appellant is entitled to recover for 504.5 cubic yards of concrete at the contract price, amounting to $4,631.31.

(4) The appellant sought also to recover for 830.7 cubic yards of concrete placed in the bottom of the lower reservoir, which it is claimed was in excess of 7.5 inches thickness agreed

upon in a supplemental agreement. This, at the contract price of $9.08 per cubic yard, amounts to $7,542.75. To avoid controversies similar to those which developed as to redressing the slopes and bottom of the upper reservoir, several conferences were had and letters passed between the officers of the appellant and the city engineer before work was commenced upon the lower reservoir. The point of friction was resurfacing the bottom, the appellant desiring to avoid doing this at the contract price of fifty cents per cubic yard for excavation. These negotiations culminated in a written proposal from the appellant, dated June 7, 1910, the portions of which, material to the matter here under consideration, were quoted in the answer of the city engineer dated June 14, with his acceptance, modification, or rejection, as follows:

"'5. In lieu of your changing the base concrete to 1-3-6 and the surface to 1 to 1½, we agree to make the base of an average thickness of 6½ inches, as stated above for the slopes, and the same average of thickness on the bottom.' This is accepted. '6. The bottom is to be prepared for the concrete by simply rolling with a steam roller, to within twenty feet of the foot of the slopes, from which point to the foot of the slopes the surface is to be finished in excavating the talus.' '7. We are to be allowed the cost of doing the rolling, you to stand the cost of loading and unloading the roller on the cars, and we to pay for transportation of the same.' These paragraphs are accepted. '8. We presume you will desire to go over the entire bottom with a street-surfacing machine to remove the clover and weeds before the rolling is done, which will not be of any considerable expense, but will, we assume, be included within the cost of rolling.' It is my opinion you should remove this clover at your own expense, as it has all grown since the contract was awarded you, and would not have required removing if you had laid the lining sooner. '9. A new grade is to be agreed upon by your Mr. Alexander and our Mr. Rollins, so that the thickness of the base will average 6½ inches with an allowed variation of from 5 inches to 8 inches.' This proposition is accepted, with the understanding that the base of each slab is to

average 6½ inches, with a maximum thickness of 8 inches, and a minimum thickness of 5 inches."

Item 6 as to steam rolling was afterward waived by the respondent. It is thus apparent that the changes contemplated were change of grade to avoid redressing the bottom, change of thickness of lining to compensate for unevenness of the bottom, and change of proportions of the concrete aggregate. The evidence shows that there was a delay in Rollins and Alexander, engineers for the contractor and city respectively, getting together to agree upon the new grade. Rollins, however, made an estimate that a raise of grade of 0.15 of a foot would give an average thickness of base of from 6⅜ to 6⅝ inches, which would make the average thickness of lining 7⅜ to 7⅝ inches. He estimated that the added thickness of base over 6½ inches average would not require over 100 cubic yards of additional concrete, and Alexander told him the city would pay for that amount. Accordingly, on June 20, the president of the appellant company wrote the city engineer, offering to proceed on that basis. This letter was not answered at once, and the president of the appellant, on June 24, wrote another letter, stating that the appellant would clean the grass and weeds from the bottom, take off high points amounting to ten or twelve per cent at the "newly established grade so that no part of the base will be less than five inches thick, and make no extra charge for any excess concrete in the bottom, on the basis that we are to make the base 6¼ inches instead of 6½ inches on the slopes. We have instructed our Mr. Davis to go ahead at once on this basis, as we can think of absolutely nothing else but what is fully agreed upon." On June 28 the city engineer in answer to these letters, after quoting the last one, continued:

"I understand this to mean that the grade of the finished surface of the bottom of the reservoir is to be raised 0.15 feet above the original levels shown on our plan for the entire area; that the minimum thickness of the base of the slabs

in the bottom of the basin is to be 5 inches and the minimum finished thickness 6 inches, including the mortar surface; that you will do such grading and surfacing as may be necessary to secure such minimum thickness; that you will make no charge for grading or surfacing the bottom of the basin or for removing clover or weeds; that the thickness of the base of the slab on the slopes is to be 6¼ inches or 7¼ inches, including the mortar surface, and that the concreting in the lining of the reservoir on both sides and bottom is to be computed as though it were 7 inches thick, including the mortar surface, and paid for at the rate of $9.08 per cubic yard based on this measurement. Should it prove that raising the grade of the bottom 0.15 feet and grading off such area as may be necessary to secure such minimum thickness produces slabs having an average thickness of more than 7½ inches, including the mortar surface, that you are to make no claim for extra yardage in concrete. This letter is intended to fulfill and confirm the terms of your letter of June 7th, referred to as paragraph 9 in my letter of June 14th, in which you say 'a new grade is to be agreed upon by your Mr. Alexander and our Mr. Rollins, so that the thickness of the base will average 6½ inches, with an allowed variation of from 5 inches to 8 inches'; and to explain and render definite this agreement as to the position of the grade and thickness of the concrete lining. With this understanding, your proposal is accepted."

To this the appellant answered:

"Replying to yours of the 28th, you are correct in all the statements contained therein, and also in your understanding that no charge will be made for grading or surfacing the bottom, or for removing the clover and weeds, except the compensation of ¼ inch reduction in the thickness of the concrete base on the slopes, making it 6¼ inches instead of 6½ inches."

It transpired that the raise of grade of the bottom of the reservoir 0.15 feet increased the amount of concrete by making the thickness of the lining greater than the appellant's engineer had estimated. It is for this excess concrete that the claim is made. There can be no question that there was a meeting of the minds on the grade as fixed. While there

is evidence to show that the city engineer and Alexander, prior to the acceptance of the appellant's offer to fix the grade at a raise of 0.15 feet, had checked the matter up so they were sure the city would be safe in accepting that grade, and indeed knew that the grade could be safely fixed much lower, this fact cannot override the plain offer to so fix the grade and its acceptance by the city. The parties were dealing at arm's length, and the representatives of the city were not required to do more in passing upon this offer than to see that it was safe for the city. The court cannot stand *in loco parentis* to the contractor. There can be no recovery for this item.

The judgment is reversed, with directions that the writ issue for the allowance and payment of $4,631.31, which we have found due for the third item claimed.

MOUNT, C. J., MORRIS, and FULLERTON, JJ., concur.

[No. 9536. *En Banc.* October 15, 1912.]

GEORGE MEAD *et al.*, *Respondents*, v. JOHN KALBERG *et al.*, *Appellants*.[1]

BONDS—INJUNCTION BONDS—DAMAGES—LOSS OF PROPERTY—REMOTE OR SPECULATIVE DAMAGES—ACTIONS—INSTRUCTIONS. Where a temporary injunction was issued restraining the defendants from performing a city contract assigned to them by the plaintiffs, and an injunction bond was given by plaintiffs on appeal to keep the injunction in force, which bond obligated the plaintiffs to pay all costs and damages that may accrue to the defendants by reason of continuing the temporary injunction in force during the pendency of the appeal, it must be held that the parties contemplated any loss of profits and any damages to defendants that might accrue by reason of subcontracts, then in existence and known to the parties by which defendants had sublet the work, such profits not being too remote or speculative; hence, in a subsequent action on the injunction bond, the jury is properly instructed that it may take

[1]Reported in 127 Pac. 185.

the subcontracts into consideration as tending to prove damages by loss of profits that could have been made on the contract.

BONDS—INJUNCTION BOND—LIABILITY OF PRINCIPAL. Recovery on an injunction bond obligating the plaintiffs and surety to pay all costs and damages that may accrue to the defendants by reason of continuing the injunction in force cannot be objected to as subjecting the surety to a greater liability than that of the principal, since the statute makes the assumption of the liability by the principal a condition precedent to the continuance of the injunction.

BONDS—INJUNCTION BONDS—PLEADING—ACTION—COMPLAINT. In an action upon an injunction bond, the proceedings leading up to the injunction and judgment in the former action are relevant and may be pleaded in the complaint.

JUDGMENT—RES JUDICATA—PARTIES—BONDS—SURETIES ON BOND OF PARTY. Matters determined on a former appeal are *res judicata* in an action by defendants against the plaintiffs and their surety on an injunction bond given in the former action.

PLEADING—ADMISSIONS—ISSUES AND INSTRUCTIONS—OFFSET FOR ADMITTED NOTE. Where, in an action on an injunction bond, the complaint admitted the existence of a $3,000 note due to the defendants as an offset to the damages alleged in the sum of $13,000, and the reply to the counterclaim on the note alleged that the note had long since been paid, the pleadings, while confusing, constitute a mutual admission that there has been no actual payment of the note; hence instructions on the subject are prejudicially erroneous, where the jury were told that the burden of proving payment of the note was upon the plaintiffs, that if they found damages, they could deduct therefrom the amount due on the note, but if not satisfied that the plaintiff is entitled to recover, and that the note was not paid, they must find for the defendant for the amount due on the note; since the instructions should have been framed to allow defendant an offset or judgment for the amount due on the note, upon any verdict rendered.

Appeal from a judgment of the superior court for King county, Main, J., entered December 2, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on bonds given on appeal. Reversed.

John S. Jurey and *James B. Murphy*, for appellants.

McClure & McClure, *Edwin C. Ewing*, and *Jas. A. Snoddy*, for respondents.

ELLIS, J.—This is an action upon the appeal bond, the supersedeas bond, and the bond continuing in force the temporary injunction, in the case of *Kalberg v. Meade*, 50 Wash. 268, 97 Pac. 59. There was a verdict and judgment for the plaintiffs. The defendants, Kalberg & Company and the surety company, have appealed.

The complaint alleges, that the appellants Kalberg & Company entered into a contract with the city of Seattle for the performance of certain street improvement work; that they assigned the contract to the respondents in consideration of the execution and delivery of their interest-bearing note for $3,000; that the respondents commenced work; that the appellants Kalberg & Company ejected and dispossessed them and procured a temporary injunction preventing them from prosecuting the work; that the injunction was dissolved; that the appellants Kalberg & Company appealed from the order dissolving the temporary injunction, and gave an appeal bond in the sum of $200, a supersedeas bond in the sum of $10,000, and a bond in like sum to continue the temporary injunction in force; that the judgment was affirmed upon appeal; that the appellants Kalberg & Company completed the contract pending the appeal, and that they received the bonds and warrants from the city to the full extent of the contract price.

It is further alleged that the judgment appealed from and superseded directed the appellants Kalberg & Company to assign and deliver to the respondents all bonds and warrants received by them from the city for and on account of any work performed by them under the contract; that they received bonds and warrants to the extent of $48,000; that respondents, after the affirmance of the judgment, demanded an assignment and delivery of the bonds and warrants, or in the alternative that the appellants Kalberg & Company pay to them $13,050.17 damages by reason of the appeal; that the appellants Kalberg & Company refused either to deliver the bonds and warrants or to pay the damages; that

respondents could have completed the contract for $34,950.35; that the appellants Kalberg & Company are entitled to a deduction of the $3,000 note, less a note of $180 made by Kalberg & Company in favor of the respondents; that by reason of the premises, the respondents are damaged in the sum of $13,050.17; and that, upon the surrender and cancellation of the notes, the net amount due to the respondents is $10,107.97. These matters are all admitted, except the amount of the bonds and warrants received and the damages claimed. The appellants assert that the respondents could not have performed the contract for the price the city had agreed to pay, and consequently they were not damaged. The contract between the city and Kalberg & Company, the assignment to the respondents, the appeal bond, the supersedeas bond, and the bond to continue the temporary injunction in force, are attached to and made parts of the complaint.

After the assignments of the contract by Kalberg & Company to the respondents, and shortly before the latter commenced work under the assignment, the respondents sublet a part of the work on terms which if performed by the subcontractors would have left a profit to the respondents. These subcontracts, not being then in existence, were not within the contemplation of the appellants when the original city contract was assigned. They were, however, in existence and in process of performance and known to the appellants when the bonds were given. Over the objection of the appellants, the subcontracts were admitted in evidence. The court, after instructing the jury that the measure of damages was the difference between what it would have cost the respondents to perform the work and the fair market value of the bonds and warrants paid to the appellants for the performance of the work, further instructed that, in determining what it would have cost the respondents to perform the contract, it could consider the subcontracts, if it found that they were made and that they would have been performed by

the subcontractors; that the law presumes that they were made in good faith and with the intention of being performed; that they are not conclusive that they would have been carried out or that the work could have been done for the price agreed upon; that they were circumstances to be considered, and that the jury should give them such weight as it thought they deserved "as tending to show or prove the main issue in the case, viz., would plaintiffs have performed their work at a profit."

The appellants contend that the subcontracts were not admissible as evidence, and that the court erred in instructing the jury that it might consider them in determining what the work would have cost the respondents. The respondents earnestly insist that, the bonds having been given with knowledge of the subcontracts, they were competent evidence, and that the instructions correctly stated the law. The condition of the appeal bond is that the bond shall be void if the appellants shall "pay all costs and damages that may be awarded against them on the said appeal or on the dismissal thereof," not exceeding the sum of $200. The condition of the supersedeas bond, so far as here material, is that the bond shall be inoperative if the appellants "shall and will pay all costs and damages that may be awarded against them on the said appeal or on the dismissal thereof, and further shall and will satisfy and perform the judgment and decree appealed from in case it shall be affirmed, and any judgment or order which the said supreme court may render or make, or order to be rendered or made, by the said superior court." The condition of the bond to continue the injunction in force is that it shall be void "if the said appellants shall pay to the said respondents all costs and damages that may be adjudged against the said appellants on the said appeal, and all costs and damages that may accrue to the respondents by reason of said temporary injunction remaining in force during the pendency of the said appeal." The several bonds were given in compliance with the provisions of the statute, Rem. & Bal.

Code, §§ 1722, 1723. The law as to the admissibility or inadmissibility of subcontracts or other subordinate contracts, or evidence of other special circumstances enhancing damages in actions upon breach of contract on the issue of loss of profits, is well settled in accordance with the following rules:

"As a general rule a breach of the original contract will not entitle the plaintiff to recover as damages the gains or profits of collateral enterprises or subcontracts into which he has been induced to enter, such profits or gains being entirely too speculative and contingent and not the natural and probable consequence of the original breach. Where, however, the knowledge of the subcontract is within the contemplation of the parties when the original contract is made, and is known to have been made in reference thereto, another rule exists and the anticipated gains or profits may be recovered." 13 Cyc. 55, 56.

Both of these rules are recognized, and the first one is exemplified and applied, in the leading cases of *Hadley v. Baxendale*, 9 Exch. 341, and *Masterton v. Mayor etc. of Brooklyn*, 7 Hill 61, 42 Am. Dec. 38. Examples of the application and grounds of the second rule may be found in: *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Hubbard v. Rowell*, 51 Conn. 423; *Jordan, Marsh & Co. v. Patterson*, 67 Conn. 473, 35 Atl. 521; *Robinson & Co. v. Hyer Bros.*, 35 Fla. 544, 17 South. 745; *Messmore v. New York Shot & Lead Co.*, 40 N. Y. 422; *Campbellsville Lumber Co. v. Bradlee*, 96 Ky. 494, 29 S. W. 313; *Lewis v. Roundtree*, 79 N. C. 122, 28 Am. Rep. 309; *Sedro Veneer Co. v. Kwapil*, 62 Wash. 385, 113 Pac. 1100.

It is obvious that, in cases where the last mentioned rule would apply, the instruction as given by the court would be proper. It may be conceded that, if this were a suit simply for damages for breach of the original contract of assignment or upon the supersedeas bond alone, the first of the above rules would apply, because the subcontracts were not in contemplation of the appellants when the contract of assignment

was made, and the supersedeas bond by its terms does not enlarge the liability undertaken in that contract.

The vice of the appellants' contention, as it seems to us, is found in the apparent assumption that the bond continuing the injunction in force was given to preserve the *status quo* as of the date of the original contract of assignment; whereas, it was intended to preserve the status as it existed when the bond was given. The injunction bond continued a new status not contemplated by the original contract. The parties must, therefore, be held to have contemplated every element of that new status. The bond should, therefore, be construed as contemplating everything in the situation of the parties of which both parties were then cognizant. While in each of the bonds the appellants obligate themselves to pay all costs and damages that may be adjudged against them on the appeal, the bond continuing the injunction contains the further obligation to pay "all costs and damages that may accrue to the respondents by reason of said temporary injunction remaining in force during the pendency of said appeal." Such is the statutory condition of the injunction bond. By the very terms of the statute it is imposed as a condition to the continuing of the injunction in force that there be an undertaking to answer for all damages resulting from that continuance, in addition to those resulting from the breach of the original contract or from the original cause of action. If the injunction bond has not this additional force, it is a useless thing. It would secure nothing not secured by the supersedeas bond. The injunction would be continued without penalty on the one hand and without redress on the other, however wrongful its issuance or oppressive its effect. Ordinarily, as we have seen, subcontracts cannot be considered, not because their loss causes no damage, but because not in contemplation of the parties at the time of their entering into the original contract. But when the bond is given, the parties must be held to contemplate every then known condition or circumstance which may re-

sult in damage "by reason of the injunction remaining in force," which would not be too remote or speculative to be the basis of damage in any case. The subcontracts were therefore admissible, not to enhance the damages recoverable upon the original contract and already created by the breach, but as tending to prove damages arising from the continuing injunction and on the independent undertaking to pay such damages. This is not penalizing the appellants for taking the appeal, but merely requiring them to answer for the damages which would not have accrued from the appeal but did accrue from the continuance of the injunction, and for which the respondents would have no other remedy.

Nor does it subject the surety to a greater liability than that of the principal. The statute itself makes the assumption of an added liability by the principal, commensurate with the added damage which the respondents may suffer by reason of the injunction remaining in force, a condition precedent to its so remaining in force. The surety is subjected to no greater liability. Whether the loss of the performance of the subcontracts by the continuance of the injunction in force was a damage by loss of profits was dependent upon the same facts and presumptions as would enter into the determination of that question in any case where they could be considered at all. These facts and presumptions were submitted to the jury in the instructions as given. We find no error in the admission of the subcontracts, or in the instruction as to their qualified probative force.

Two cases are cited which on first impression might seem to sustain the appellants' contention. The case of *Whitney v. Allen*, 21 Cal. 234, seems to us not applicable to the facts here. In that case the appeal by the defendant was from a decree foreclosing a mortgage. The supersedeas bond, among other things, was conditioned that, if the judgment should be affirmed, the defendant would pay to the plaintiff the value of the use and occupation of the premises pending the appeal. The judgment was affirmed, but there having

been no sale of the property, it was held in a suit brought upon the bond that there could be no recovery for the use and occupation of the property between the appeal and affirmance. This was upon the express ground that the decree of foreclosure gave no right of possession or to the rents and profits, prior to a sale and deed on the foreclosure. The court, therefore, held that the statutory provision in the supersedeas bond in regard to use and occupation must be understood as referring to those cases in which the creditor is entitled to the value of the use. The distinction seems plain. It was to hold a possession which had been adjudged wrongful that the injunction bond in the case before us was given. In the other case, *Stearns v. Brown*, 1 Pick. 530, it was sought to hold an administrator liable for interest upon money held by him pending an appeal which he had prosecuted under a statute requiring an appellant, whether plaintiff or defendant, to give security for "intervening damages." It was held that this would not constitute intervening damages, since if he had made use or profit of the money during the pendency of the appeal, he might be cited in the probate court to account for it as for any other money received, regardless of any appeal. We fail to see any real similarity between that case and the case before us.

Certain paragraphs of the complaint detail the proceedings leading up to, and the dissolution of, the temporary injunction and the judgment in the former action. A motion of the appellants to strike these paragraphs as irrelevant was denied. Error is predicated upon this ruling. While the facts are probably pleaded with unnecessary detail, the matter is pertinent to the issue.

For a second affirmative defense the appellants alleged, that the respondents procured the assignment of the contract by falsely representing that their note for $3,000 was of that value; that their bond was insufficient; and that the respondents breached the contract by failing to perform. This matter was stricken on the motion of the respondents, and

error is suggested upon this ruling. These questions were determined adversely to the appellants in the first case, and are *res adjudicata*. *Kalberg v. Meade*, 50 Wash. 268, 97 Pac. 59.

It is alleged in the complaint, that the appellants Kalberg & Company are the owners of the $3,000 note given as consideration for the assignment of the city contract; that they are entitled to a deduction of the principal of the note, less the $180 note, from the amount due to respondents. This is not denied. In the first separate answer and counterclaim, the appellants Kalberg & Company allege the making of the $3,000 note and its nonpayment. In the reply the respondents deny the nonpayment, and allege affirmatively that both principal and interest of the note have long since been paid. On this question the court instructed the jury that the burden was upon the respondents to prove the payment of the note; that if they found that the respondents could have performed the contract at a profit, they should determine the amount of the profits and deduct the principal and interest due upon the note, and that "if, however, you shall not be satisfied by a fair preponderance of the evidence that the plaintiff is entitled to recover, and that said note has not been paid, then you will find the verdict for the defendants for the amount of said note plus interest thereon at eight per cent per annum, commencing nine months after its date." While the pleadings are somewhat cloudy as to the status of the $3,000 note, we think, when construed together, they constitute a mutual admission that there has been no actual payment of this note, and that the principal sum should be deducted from any verdict in favor of the respondents. This being true, the jury should have been instructed to the effect that, if it should find that there would have been no profit to the respondents, the verdict should be for the appellants Kalberg & Company for the amount of the principal and interest of the $3,000 note, less the $180 note; and if it should find that the profits were less than the principal and

interest of the note, the verdict should be for the appellants Kalberg & Company for the difference; and if it should find the profits greater than the principal and interest of the note, the verdict should be for the respondents for the difference. In either case, the $180 note should be added to the amount found due to the respondents as an offset against the larger note. If we correctly understand the record, the appellants Kalberg & Company gave the respondents their note for $180 as a rebate for the first nine months' interest on the $3,000, and there does not seem to be any claim that this note has ever been paid.

The respondents' contention that no interest should be allowed on the $3,000 is not tenable. It expressly provides for the payment of interest. The instructions of the court on this question appear to us to be contradictory and confusing, and we have no means of knowing what effect they had upon the verdict. Other errors suggested by the appellants are technical and without merit. Excepting as hereinbefore indicated, the instructions correctly state the law of the case.

For the error noted, the judgment is reversed, with directions to grant a new trial.

MOUNT, C. J., GOSE, PARKER, CROW, CHADWICK, and MORRIS, JJ., concur.

MAIN, J., took no part.

[No. 10695. *En Banc.* October 15, 1912.]

SOREN SORENSON *et al.*, *Appellants*, v. KITTITAS RECLAMATION DISTRICT *et al.*, *Respondents*.[1]

STATUTES—SUBJECTS AND TITLES—AMENDMENTS—ENUMERATION OF SECTIONS AMENDED. The title of an act to amend an act providing for the organization and government of irrigation districts and the sale of bonds arising therefrom, the same being sections..... (specifying certain sections amended) sufficiently expresses the subject of the act without such enumeration of the amended sections, which may be treated as surplusage; hence the amendment of another section not specified in the title of the amendatory act is not void as not embraced within the title of the act, as required by Const., art. 2, § 19.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered September 5, 1912, in favor of the defendants, after a trial before the court, dismissing an action for an injunction. Affirmed.

F. A. Kern, for appellants.

Bogle, Graves, Merritt & Bogle, for respondents.

MAIN, J.—This action was brought by the plaintiffs for the purpose of enjoining the defendants from the issuing and selling of bonds of the Kittitas Reclamation District. The facts are not in dispute. The appellants, who are husband and wife, are the owners of land within the boundaries of the Kittitas Reclamation District, which irrigation district was organized and exists under an act of the legislature of the state of Washington approved March 20, 1890, and entitled: "An Act providing for the organization and government of irrigating districts, and the sale of bonds arising therefrom, and declaring an emergency," and acts amendatory thereof. Laws 1889-90, p. 671. The act of March 20, 1890, was amended by an act of the legislature approved March 22, 1895, which was entitled: "An Act to amend an

[1]Reported in 127 Pac. 102.

act providing for the organization and government of irrigation districts and the sale of bonds arising therefrom, and declaring an emergency, the same being sections 1, 2, 4, 10, 16, 17, 18, 19, 20, 22, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 38, 39, 40, 42, 59 and 70, approved March 20th, 1890, and declaring an emergency." Laws 1895, p. 432, Rem. & Bal. Code, §§ 6416-6494. Section 15 of the original act specifies that the bonds to be issued thereunder shall be installment bonds, and determines the time and manner of their payment. Section 5 of the amendatory act amends § 15 of the original act by setting forth at full length the section as amended, and provides that the bonds issued thereunder shall be payable in series, the duration of the bonds being less than that specified in § 15 of the original act. By examination of the title of the amendatory act, it will be observed that § 15 of the original act is not one of the sections specifically specified therein as being amended. These facts present the question whether or not the title of the amendatory act is sufficient to include the subject-matter of § 5 thereof. The trial below resulted in a judgment denying the prayer of the complaint and dismissing the action, from which judgment the case is here on appeal.

In § 19 of art. 2 of the constitution of this state it is provided that: "No bill shall embrace more than one subject, and that shall be expressed in the title." This constitutional provision does not require the title of an act to be an index of its provisions; but the title is sufficient if it gives such notice of its object as to reasonably lead to an inquiry into its body. *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735.

"The purpose of the title is only to call attention to the subject-matter of the act, and the act itself must be looked to for a full description of the powers conferred." *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

Is the title of the act in question thus specific? In *State v. Bankers' and Merchants' Mut. Benefit Assn.*, 23 Kan. 499, the court was considering an amendatory act entitled: "An

act to amend sections 2, 4, 17, 41, and 59 of an act entitled," etc., giving the title of the original act. In the body of the amendatory act § 78 of the original act was amended, and it was there held that § 78, not being one of the five sections specified in the title, was beyond its scope. In *State ex rel. Matson v. Superior Court*, 42 Wash. 491, 85 Pac. 264, this court considered an amendatory act entitled: "An act to amend sections 3, 9, and 24 of an act entitled," setting out the title of the original act. In the body of the amendatory act, § 5 of the original act was sought to be amended, and the court there held that, § 5 not being one of the enumerated sections in the title of the amendatory act, its attempted amendment was unconstitutional. These are the only two cases cited in the appellants' brief on the question presented, and they are relied on as supporting the contention that the failure to specify in the title of the amendatory act of March 22, 1895, § 15 of the original act renders such attempted amendment of § 15 unconstitutional.

But we think these cases are clearly distinguishable from the instant case. In both of these cases the acts in question were entitled acts to amend certain sections of previous acts of the legislature, specifying the sections, while the act of the legislature we are now considering is entitled, not an act to amend certain sections of an act, but "An Act to amend an act providing for the organization and government of irrigation districts and the sale of bonds arising therefrom, and declaring an emergency, the same being sections," then setting out the sections. There is a distinction between the title of an act entitled, "An Act to amend an act," etc., and the title of an act of the legislature entitled an act to amend certain specified sections of the original act. The constitution nowhere provides that the section of an act sought to be amended shall be indicated. It requires that the act revised or the section amended shall be set forth at full length in the amendatory act. Constitution, art. 11, § 37.

The enumeration of the sections in the title of the act of March 22, 1895, under the designation, "the same being sections 1, 2," etc., was unnecessary, as the title without such enumeration was sufficient to satisfy the constitutional requirement that the subject of the act shall be expressed in the title; and the fact that § 15 was not specified in the title of the amendatory act of March 22, 1895, would not render the amended section five unconstitutional and void. The subject-matter of § 5 of the amendatory act is the same as the subject-matter of § 15 of the original act. The title of the amendatory act, eliminating the enumeration of the numbers of the sections therefrom, is the same as the title of the original act. The enumeration of the numbers of the sections in the title of the amendatory act is unnecessary and may be treated as surplusage. *Otis v. People ex rel. Raymond*, 196 Ill. 542, 63 N. E. 1053; *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707; 36 Cyc. 1058.

In *Otis v. People, supra*, the supreme court of Illinois was considering the title of an act wherein the title specified that § 202 of art. 8 of a certain act was to be amended, giving the title of the original act. The original act contained no § 202, but § 122 was the section which evidently was intended to be amended. The court, in holding that the title was sufficient, used this language:

"We think the number 202, as used in the various amendments of said section 1 of article 8 of the act of 1898, may be regarded as surplusage, and as wholly immaterial in determining whether the act of April 21, 1899, amending section 1 of article 8 of chapter 122, is now in force. The constitution nowhere provides that the section of an act sought to be amended shall be indicated. It requires that the subject-matter of the act sought to be amended shall be expressed in the title of the amendatory act and that the section amended shall be inserted at length in the new act. In the amendatory act of April 21, 1899, both of these constitutional provisions are fully complied with. The subject-

matter of the act sought to be amended is fully stated in the title, and the section sought to be amended is inserted at length in the new act."

In *State ex rel. Wolfe v. Parmenter, supra*, this court was considering the sufficiency of the title of an amendatory act, entitled: "An act amending an act entitled 'An act to amend section 3 of chapter 83 of the laws of 1897, relating to revenue and taxation. . . . '" Section 3 of chapter 83 of the Laws of 1897 does not refer to revenue and taxation, but refers to monuments and notices upon mining claims. The body of the amendatory act treats of the subject of revenue and taxation, and the court, in holding that the title was sufficient under art. 2, § 19, of the constitution, used this language:

"We think the erroneous reference to the former statute must be treated as mere surplusage, and inasmuch as without that part of the title there is a clearly stated and single subject which is followed by a clear treatment of that subject in the act itself, the statute becomes an independent one and has the effect of amending any existing statute upon the subject and of repealing by implication any previously existing provisions in conflict with it. We therefore hold that the act is not invalid by reason of its title."

We therefore conclude that the judgment of the trial court was right and should be affirmed.

All Concur.

[No. 10393. Department Two. October 16, 1912.]

ELIZA A. PHILLIPS, *Respondent*, v. MATTIE A. THOMAS, *Appellant*.[1]

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—EVIDENCE—WEALTH OF DEFENDANT—DAMAGES. Punitive damages not being recoverable in this state, in an action for alienation of a husband's affections, evidence that defendant frequently spoke to plaintiff's husband of defendant's great wealth, is inadmissible, where there was no evidence that she held out her wealth as an inducement for the husband to divorce the plaintiff and marry her, or tending to connect such evidence with other matters causing the alienation.

APPEAL—REVIEW—ERROR IN ADMISSION OF EVIDENCE—INSTRUCTIONS TO CURE ERROR. Where the jury gave plaintiff a verdict for $35,000 for the alienation of the affections of her husband, aged nearly fifty years, by a woman of 56, it cannot be said that an instruction to disregard the wealth of the parties cured error in admitting evidence tending to show the defendant's great wealth.

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—DAMAGES—MITIGATION. In an action for alienation of affections, the fact that the husband and wife had been living separate and apart for three years, and had little affection for one another, may be shown in mitigation of damages.

SAME—ALIENATION OF AFFECTIONS—DAMAGES—EXCESSIVE VERDICT. A verdict for $35,000 for alienation of a husband's affections, reduced by the trial court to $25,000, is still so excessive and unreasonable as to raise a presumption of passion and prejudice, requiring a new trial, where the parties were past middle life, had been living separate and apart for three years, and had little affection for one another.

Appeal from a judgment of the superior court for King county, Myers, J., entered January 19, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for alienation of affections. Reversed.

Robert F. Booth and *A. J. Falknor*, for appellant.

Reynolds, Ballinger & Hutson, for respondent.

[1]Reported in 127 Pac. 97.

ELLIS, J.—This is an action for the recovery of damages for the alleged alienation of the affections of the plaintiff's former husband. The jury returned a verdict against the defendant for $35,000. The defendant moved seasonably for a new trial upon all of the statutory grounds, and the court, deeming the verdict excessive, overruled the motion upon the condition that the plaintiff would remit $10,000 from the verdict. The plaintiff accepted this condition, and a formal judgment for $25,000 was entered against the defendant, from which she has appealed.

There are many assignments of error, but we find it unnecessary to discuss any of them except those which we find well taken. Nor do we, in view of the fact that a new trial must be had, find it necessary, or even proper, to discuss the evidence further than as applicable to those assignments.

The respondent's son was permitted to testify, over the appellant's objection, that he had on several occasions heard the appellant speak to the respondent's former husband of appellant's great wealth, estimated at a million dollars or over, that she had told him where it was located. There was no evidence that this great wealth was held out by the appellant as an inducement to respondent's husband to marry her, or to induce him to divorce the respondent. Nor was there any evidence tending to connect this evidence with other matters charged as causing the alienation. It did appear, however, that the respondent's former husband had business dealings with the appellant for some time prior to the alleged alienation, and that he, the appellant, and her son organized a business concern known as the Thomas-Phillips Investment Company, which reasonably accounts for an innocent mention of her property. In the absence of evidence tending to show that the appellant in some manner held out her wealth as an inducement to respondent's former husband to desert the respondent, the evidence complained of was inadmissible and its admission was highly prejudicial. The court early committed itself to the view that the doctrine of exemplary or punitive dam-

ages is unsound in principle, and that such damages cannot be recovered except when expressly allowed by statute. We have steadily held that, in the absence of such statutory sanction, compensatory damages only can be recovered in any case. *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. 842, 11 L. R. A. 689; *Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620; *Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1063, 117 Am. St. 1079, 8 L. R. A. (N. S.) 783; *Caldwell v. Northern Pac. R. Co.*, 56 Wash. 223, 105 Pac. 625; *Baer v. Chambers*, 67 Wash. 357, 121 Pac. 843. The rule has also become established, by an almost universal trend of authority, that evidence of a defendant's pecuniary resources is inadmissible in all cases where compensatory damages only are recoverable. Such evidence is only admissible as bearing upon the amount of punitive or exemplary damages which may be awarded. 13 Cyc. 212; 4 Ency. of Ev., 27; *Western Union Tel. Co. v. Cashman*, 132 Fed. 805; *Laidlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679, 690, 44 L. R. A. 216; *Madigan v. Town of Schaghticoke*, 128 N. Y. Supp. 800.

In *Baer v. Chambers*, *supra*, we said:

"No decision has come to our attention holding such evidence admissible in states where the doctrine of punitive damages does not prevail. This court, in the early case of *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. 842, 11 L. R. A. 689, repudiated the doctrine of punitive damages as unsound in principle. The views there expressed have been consistently adhered to ever since. *Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1063, 117 Am. St. 1079, 8 L. R. A. (N. S.) 783. This seems to remove the only basis upon which such evidence could be rendered admissible. It seems to us inconceivable that the amount of respondent's damages should be measured by the financial worth of appellant, when respondent has no right to punitive damages. We conclude that the admission of this testimony was such prejudicial error as entitles appellant to a new trial."

The same rule prevails in actions for alienation of affections.

"It was no doubt competent for either party to show plaintiff's occupation, and perhaps the social position of herself and husband, as bearing upon the value of her husband's consortium; but the wealth, rank, social position, or condition of defendant was wholly immaterial." *Bailey v. Bailey*, 94 Iowa 598, 63 N. W. 341.

The respondent contends that the admission of this evidence was cured by an instruction of the court directing the jury to "disregard the wealth and resources of the respective parties," in arriving at a verdict. But, in view of the enormous verdict actually rendered—$35,000 for the alienation of the affections of a man apparently near fifty years of age by a woman of fifty-six—we cannot say that the jury gave heed to the instructions and ignored her wealth in assessing the damages. The supreme court of Iowa, in an action of this same character and touching the admission of evidence of the same kind where a similar instruction was given, has used language so pertinent to the situation here presented that we quote it:

"It is contended by appellee, however, that, conceding the error, it was cured by an instruction given by the court in the charge to the jury. It is true that the court undertook, in the seventh paragraph of the charge, to limit the consideration of the evidence as to financial worth of the subject of the statement attributed to defendant, and to forbid consideration thereof in connection with the subject of damages. Now, ordinarily we say that an error in the admission of evidence is cured by an instruction directing that such evidence be disregarded, or limiting the consideration thereof to the subject-matter to which alone it may have relation. But the rule is not one of universal application. An error may be of such serious character that an instruction will not cure it. This we have often said. *Martin v. Orndorff*, 22 Iowa 505; *George v. Railroad*, 53 Iowa 504, 5 N. W. 615; *Hall v. Railroad*, 84 Iowa 311, 51 N. W. 150. Here, as we have seen, the evidence objected to was not competent for any purpose. Should we concede, however, that no serious harm

could have followed had such evidence been considered only in the connection as directed by the court in its instruction, still, having regard to the probabilities, we are united in the conclusion that the jury did not observe the limitation prescribed." *Flinders v. Bailey*, 133 Iowa 616, 111 N. W. 27.

The excessiveness of the verdict incontrovertibly shows that the jury was either influenced by the improper evidence or by improper motives of passion and prejudice. We cannot assume that it was not, at least in some degree, the former. The case of *Knapp v. Wing*, 72 Vt. 334, 47 Atl. 1075, cited by respondent, is not apposite. There the defendant, an aunt of the plaintiff's husband, had said to him that he could never have a cent of her property as long as he lived with the plaintiff, and in that connection evidence as to the amount of her property was held admissible. The threat being made as an inducement, the amount of her wealth was material as showing the probable effectiveness of the threat. There was no such warrant for the admission of the evidence here.

Touching the amount of the verdict, we have been cited to no case of this character later than the English case of *Duberley v. Gunning*, 4 Term Rep. (D. & E. 1792), 651, in which a verdict for as much as $25,000 has been sustained. Nor have we been cited to any American case, save one, where a verdict in excess of $15,000 has been upheld. In *Speck v. Gray*, 14 Wash. 589, 45 Pac. 143, under circumstances of peculiar aggravation, this court sustained a verdict for that amount. From decisions of other courts we have been cited to but one case where a verdict exceeding that sum was sustained. In *Waldron v. Waldron*, 45 Fed. 315, a verdict of $17,000 was upheld, the court expressly charging that, if the defendant's action was found wanton and malicious, punitive damages might be awarded; which, as we have seen, is contrary to the rule in this state. In *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784, a verdict for $15,000 was, by a divided court, upheld, the majority opinion stating that, though the damages were seemingly large, the conduct of the

defendants appeared to have been wilful and malicious; which seems to indicate that the punitive idea to a degree influenced the decision. In *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614, a verdict for $12,500 was sustained, under a statute allowing exemplary damages where the injury was attended by "fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings," the court holding that the jury was warranted in finding the defendant's conduct grossly unjustifiable.

The foregoing are the largest verdicts to which we have been cited as having been sustained by any court in a case of this kind, and in nearly all of them the punitive principle is distinctly recognized. We have been cited to no other decision sustaining a verdict in excess of $6,000 in a case of this nature. The evidence before us shows that the respondent's former husband, a mining broker, had, some three years prior to the alleged alienation and divorce, discontinued his business in Spokane and opened an office in Seattle, and that he and the respondent, for reasons of convenience, had been living separately, she in Spokane, he in Seattle, for the greater part of those three years. The only reason she gave for this separation was that she could not sell her home in Spokane. There was also evidence tending to show conduct on his part with other women than appellant, during this period, such as to indicate little affection for the respondent. These matters should have been considered in mitigation of damages. *Angell v. Reynolds*, 26 R. I. 160, 58 Atl. 625, 106 Am. St. 707.

Under all of the circumstances disclosed by the record, we are constrained to hold that the verdict was so excessive as to raise a presumption of passion and prejudice, and that, even as reduced by the trial court, it was grossly excessive. While we have in many cases, where a verdict has been found excessive, permitted the plaintiff to remit a portion of the recovery rather than grant a new trial unconditionally, we have in other cases, where the amount awarded was so exces-

sive and unreasonable as to be unaccountable except upon the theory that the jury was influenced by passion, prejudice, or a spirit of vindicativeness, refused to deprive the defendant of a new trial upon the whole case. *Olson v. Northern Pac. R. Co.*, 49 Wash. 626, 96 Pac. 150, 18 L. R. A. (N. S.) 209; *Caldwell v. Northern Pac. R. Co.*, 56 Wash. 223, 105 Pac. 625.

The courts have often expressed a reluctance to reduce even excessive verdicts in actions for alienation of affections, because of the lack of any rational basis upon which to fix the proper amount. But the same reason does not apply to the granting of a new trial where the verdict is palpably unreasonable. The case before us calls for the latter course with peculiar emphasis. The verdict, even after a reduction of $10,000 at the instance of the trial court, is still far in excess of that upheld in any modern case to which our attention has been called by either side, though in many of the jurisdictions from which the citations come, punitive damages were recoverable. When we seek to analyze the frame of mind which would award $35,000 upon the evidence presented, an inquiry naturally arises as to what extent the same extravagant mental state may have entered into the jury's deliberations throughout. Under these circumstances, as we said in the *Olson* case: "It would be unjust to hold a litigant foreclosed by any of the findings." Moreover, as we have seen, the evidence as to appellant's great wealth was admitted, and could have had no other effect than to improperly augment the recovery, but to what extent we are unable to say.

The judgment is reversed, and the cause remanded for a new trial.

MOUNT, C. J., MORRIS, and FULLERTON, JJ., concur.

[No. 10696. Department One. October 16, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Union Lumber Company, Plaintiff*, v. THE SUPERIOR COURT FOR THURSTON COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN—RAILROAD CROSSINGS—RESTRICTED USE—ADJUDICATION OF NECESSITY. Upon condemnation of a railroad crossing under Rem. & Bal. Code, § 5736, the court may, in view of the settled rule that the right can be limited and exercised in a stipulated manner, adjudge the public use subject to defendant's right to use a logging road and upon condition that the petitioner shall construct and keep in repair an overhead crossing for the logging road (PARKER, J., dissenting).

SAME—RAILROAD CROSSING—LIMITED USE—COMPENSATION—RESTRICTIONS. In condemning a railroad crossing on condition that the petitioner construct and keep in repair an overhead crossing for defendant's logging road, the court may limit the damages to the right condemned and the manner in which it is sought to be exercised.

SAME—LIMITED USE—ADJUDICATION OF NECESSITY—FORM—SPECIFICATIONS FOR OVERHEAD CROSSING. An adjudication of public use and necessity for condemning a railroad crossing, on condition that the petitioner construct and maintain an overhead crossing for the defendant's logging road, is not objectionable in that it is not accompanied by specifications for the construction of a trestle and grade, since that can be left to the trial and the determination of damages to be paid under a particular and designated use, to be shown by plats and appropriate specifications.

SAME—PUBLIC NECESSITY—OBJECTIONS—NECESSITY OF ACQUIRING OTHER LANDS. An adjudication of a public use and necessity for condemning a railroad crossing is not objectionable in that the petitioner must acquire other lands in order to carry out the scheme for an overhead crossing.

Certiorari to review a judgment of the superior court for Thurston county, Easterday, J., entered August 19, 1912, adjudging a public use and necessity, in proceedings to condemn land for railway purposes. Affirmed.

[1]Reported in 127 Pac. 109.

Thomas M. Vance, for relator.

Geo. T. Reid, J. W. Quick, and *L. B. da Ponte*, for respondents.

Morris, J.—Relator operates a logging railway in connection with its mill, which crosses the right of way located by the respondent railway company, upon which it proposes to construct its new four-track line of road, known as the "water line," and to that end proposes to condemn relator's right of way at the point of intersection. The respondent, after setting forth in its petition the description of the land it seeks to appropriate, the grades of the two lines of railway, the configuration of the ground at and near the intersecting point, and the situation as to grade, overhead and underhead crossings with relation to operative conditions and matters of public safety, recites:

"That there exists a reasonable necessity for the condemnation of the right to cross said lands at grade, and that the tracks and logging road of respondent be elevated upon a trestle and fill over the tracks of petitioner's proposed line. Petitioner proposes to elevate said tracks, at its own expense and under a plan whereby the grades on said overhead crossing will be identical with the grades now existing in said logging road, and without any damage or inconvenience to respondent whatever; that it is entirely practicable so to elevate said logging railroad over petitioner's proposed line of road, and the same can be done without interfering with the continuous operation of the said line, and when done said logging railroad will be in every respect as safe and convenient to operate as at the present time and no injury whatever will thereby result to respondent. . . . and said public interests and necessities imperatively require the construction of petitioner's line at grade and the elevation of respondent's said railroad as proposed."

In due time the matter was brought on for hearing, for the purpose of obtaining a decree of public use and appropriation, and the court, after hearing evidence upon the matters set

forth in the petition, granted such decree, containing, among other things, this provision:

"It is further ordered and decreed that petitioner's said appropriation of said land is upon condition and subject to the obligation by petitioner to construct and maintain at its own cost and expense, so long as the same shall be used by respondent, an overhead crossing on a fill and trestle for the use by respondent in the operation of its certain logging railroad mentioned in said petition, and the appropriation by petitioner of said premises and of respondent's interests therein is subject to the right of respondent to operate its said logging railroad as long as it shall see fit to do so, over and across said premises on said fill trestle to be constructed and maintained by petitioner for respondent's use as aforesaid in the operation of its logging railroad."

Relator took exceptions to the entry of this decree and to the evidence upon which the quoted provision is based, and now presents its exceptions under a writ of certiorari, asking that they be sustained and the decree vacated.

The main suggestion of error is lack of power in the court to provide for an overhead crossing, and the fact that, while relator's right of way is only fifty feet wide, to provide for the proposed fill will require a base of seventy feet, necessitating the acquirement by petitioner of an additional ten feet on each side of relator's right of way, which is not sought in this proceeding, and which if acquired by petitioner, must be by purchase, or in some new and independent proceedings. Objection is also made to the fact that the decree is not accompanied by plat, design, or specifications showing the exact character of this proposed fill.

The first objection is the most serious one. We have concluded, however, to overrule it. Petitioner has the undoubted right to condemn a crossing of relator's road under Rem. & Bal. Code, § 8736. The right to condemn this crossing carries with it the right to condemn a particular crossing, and have it determined that such particular crossing is a public use, and that necessary lands may be appropriated therefor.

The law is well settled in this state that, where the right of eminent domain is given, that right may be exercised in a stipulated manner, and that the court may in its decree provide for a limited use, or a particular use, which shall recognize the rights of both parties in the use of the land appropriated; and that the jury, in determining the compensation to be paid, shall do so with reference to the particular use to which the lands are to be put and the particular method sought to be adopted in the taking and use of the lands sought to be appropriated. These and like rules have been laid down in, *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864; *State ex rel. Kent Lumber Co. v. Superior Court*, 46 Wash. 516, 90 Pac. 663; *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515; *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 Pac. 940. If then, a particular use or right may be condemned, we can see no objection to the decree of appropriation definitely determining and adjudicating the particular use to which the lands are to be put and the particular manner in which the right sought is to be exercised. This has ordinarily been done by stipulation, or some appropriate method employed at the time of the trial to ascertain the damages. If it is proper to then determine it and to have the court limit the inquiry to some special use, then it is proper for the court in the first instance to determine whether the use sought is a public use, and, as such, may be condemned and to limit the ascertainment of damages to the right condemned and the manner in which it is is sought to be exercised.

That no specifications accompany the decree is no objection. The decree determines only the legal right; it does not attempt to indicate the facts to be determined before that right can be exercised. That inquiry and ascertainment may be left to the trial, and the jury can there determine the damages to be paid under a particular and designated use, to be shown by plats, designs, or other appropriate specifications,

which become part of the record, and may be appropriately referred to in the final decree or judgment. That other lands not involved in this proceeding are necessary to respondent for use in its proposed fill is immaterial to relator, since it rests with respondent to acquire these lands in order to carry out its scheme. If it fails to do so, relator will not suffer, as it will then retain the full use of its lands as before. If respondent is successful in acquiring these necessary lands, relator has been awarded damages under the theory that they would be so acquired and used, and it has no complaint.

These considerations lead us to sustain the rulings complained of, and the decree is sustained.

MOUNT, C. J., CROW, and CHADWICK, JJ., concur.

PARKER, J. (dissenting)—If the railway company proposed to condemn the right of the Union Lumber Company to maintain its logging road at the present grade where the railway company is proposing to fix the grade of its tracks, reserving to the lumber company the right to maintain an overhead crossing of sufficient height not to interfere with the operation of the railway, I would have no trouble in agreeing with the majority opinion, under the rule announced in *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515. But since the decree of the superior court provides for something more than this reservation of right in the lumber company, by imposing upon the railway company the duty to construct and maintain for the lumber company's use the proposed overhead crossing and approaches thereto for some considerable distance on either side of the railway and beyond its right of way, it seems to me that the lumber company is being required to submit to the taking of its property by eminent domain proceedings without "just compensation having been first made or paid into court" for it, as provided by § 16, art. 1, of the state constitution. The obligation which is here sought to be put upon and assumed by the railway company, to maintain for the use of the lumber company

the overhead crossing and approaches thereto, I am of the opinion is not such payment to the lumber company for the taking and damaging of its property as is contemplated by the constitution. The lumber company is not thereby receiving full compensation at the time of the taking and damaging of its property; but of necessity it must depend upon the railway company maintaining overhead crossings and approaches thereto in the future. Instead of receiving full compensation before its property is taken, the lumber company is being compelled to accept the obligation of the railway company to maintain the overhead crossing and approaches thereto in the future, in lieu of a part of the compensation which the constitution guarantees shall be paid before the taking. This is not a mere reservation of a right in the lumber company, but is also an obligation calling for a continuing future service to be rendered by the railway company to the lumber company, which I think is not different in principle from what it would be were it a money obligation to be paid in the future after the taking. I therefore dissent.

[No. 10752. Department One. October 16, 1912.]

THE STATE OF WASHINGTON, *on the Relation of A. H. Griffin, Plaintiff*, v. THE SUPERIOR COURT FOR CHEHALIS COUNTY, *Respondent*.[1]

INTOXICATING LIQUORS—LOCAL OPTION—ELECTIONS—"GENERAL ELECTION"—STATUTES—CONSTRUCTION. Under the local option law by which the legislature intended to allow an immediate election if the people of any unit desired it, and thereafter an election should be had only at a general county or state election, a city election is a "general election" within the meaning of § 23 (Rem. & Bal. Code, § 6294), providing that the petition for an election in a local unit shall be signed by qualified electors equal in number to thirty per cent of the electors voting at the "last general election within such unit;" especially in view of the history of the passage of

[1]Reported in 127 Pac. 120.

the act showing that the several possible times for general elections were considered, and the last election preceding the regular biennial election was adopted, as giving the fairest index of the number of voters who will exercise the franchise.

STATUTES—CONSTRUCTION. The history of the passage of an act may be resorted to in determining the legislative intent in the use of the words "last general election."

Certiorari to review a judgment of the superior court for Chehalis county, Mitchell, J., entered September 24, 1912, dismissing an action to prohibit and enjoin the holding of a local option election. Reversed.

Wm. A. Greene and *W. H. Abel*, for relator.

A. Emerson Cross, for respondent.

CHADWICK, J.—The only question involved in this case is the meaning of § 3 of the law of 1909, known as the local option law. Rem. & Bal. Code, § 6294. Reference to the law will show that it was the intent of the legislature to allow an immediate election if the people of any unit so desired, and that thereafter an election should be had only at a general county or state election. The purpose of the law being thus manifest, it is contended by the respondent that the words "the last general election" in § 3, as used where reference is made to the petition, must necessarily be construed to mean the last biennial election. That part of § 3 involved in our inquiry reads as follows: "Subscribed by qualified electors of the unit equal in number to at least thirty per cent of the electors voting at the last general election within such unit." It was maintained in the court below by the relator that "the last general election" must mean the last city election. The lower court having held otherwise, the case is brought here by a writ of certiorari.

A city election is a general election. It has been frequently held, and without question, by this court that a city election is a general election within the meaning of § 10, art. 11, of the constitution: *State ex rel. Wiesenthal v. Denny*, 4

Wash. 135, 29 Pac. 991, 16 L. R. A. 214; *Wade v. Tacoma*, 4 Wash. 85, 29 Pac. 983; *Seattle v. Clark*, 28 Wash. 717, 69 Pac. 407; *Hartig v. Seattle*, 53 Wash. 432, 102 Pac. 408.

A general election is an election held at stated intervals to fill the terms of public officers regularly expiring in virtue of the constitution or some statute, and at which every one having the qualifications of an elector, as defined in the constitution and general election laws, has a right to participate. "A general election is an election held to select an officer after the expiration of the full term of the former officer." 15 Cyc. 278. *State ex rel. Fish v. Howell*, 59 Wash. 492, 110 Pac. 386. An inspection of the local option law convinces us that the legislature had in mind a broad question of public policy, and undertook to execute it by express provision; that is, that communities should not be called upon to submit to elections of this character with unusual frequency, and furthermore that an election should not be called unless there was a reasonable probability of its successful termination upon the lines suggested in the petition. To that end we believe that the words "last general election" were used advisedly and mean any general election at which there has been a general and popular expression of the public will, whether that election be a state, county or city election. Whether the statute would include other elections of a *quasi* general character, we are not now called upon to decide.

It is earnestly insisted that our law must mean the last state or county election, otherwise the legislature would have said in express terms, as in the local option statute of Kentucky, where it is provided that the petition shall be signed by a percentage of the legal voters cast in the particular precincts at "the last preceding general election." To our minds the word "preceding" adds nothing to the statute. It is enough to say the last general election. But if merit be accorded the word "preceding," as used in the Kentucky statute, we think that the argument is fully met and overcome by the words of our statute, wherein it says, "the last general election

within such unit." In support of our argument, it may be further suggested that, inasmuch as a city is made a unit in and of itself, the reason and the spirit of the law concur to sustain our conclusion, although the words "within such unit" be rejected.

Aside from our impressions formed with reference to the ordinary rules of statutory construction, and treating the act as doubtful, we may profitably resort to the history of the passage of the act through the legislature. 36 Cyc. 1138. The bill as introduced in the House, H. B. No. 29, provided that the petition should be signed by a percentage of those voting at "the last general election." As introduced in the Senate, S. B. 28, the words "at the city election last held therein" were used. In the senate substitute bill, S. B. 121, introduced by members of the judiciary committee, it was provided that the petition should be drawn with reference to "the last general biennial state election." The bill as passed by the legislature providing for a percentage of the voters at "the last general election," thus indicating that, after mature consideration and having the several possible times for general elections before it, it was deemed best to refer to the election next preceding the one at which such elections are to be held, the regular biennial election, which is provided for in apt words.

The fact that a petition calling for thirty per cent of the voters is required, further sustains our judgment. The last general election may usually be taken as a fair index of the number of voters who will exercise the franchise at the one next following, and it is manifest that the legislature intended that an election should not be called upon a small petition or unless a fair proportion of those who had theretofore exercised the franchise in the unit should manifest a desire therefor. We are not directed to any apt authority, and it may be that none can be found, but we find support for this view in the fact that the several superior judges in Spokane county,

sitting *en banc*, unanimously concurred in an opinion giving the act the construction we have put upon it.

Reversed and remanded, with instructions to enter a judgment in accordance with this opinion.

Mount, C. J., Gose, Crow, and Parker, JJ., concur.

[No. 10258. Department One. October 22, 1912.]

Pasco Reclamation Company, *Appellant*, v. Volney B. Cox, *Respondent*.[1]

Waters and Water Courses—Irrigation—Contract for Water—Indefiniteness—Meeting of Minds. A contract whereby the defendant intended to purchase from plaintiff a water right for irrigating ten acres of land is so indefinite and uncertain that it cannot be enforced, where the contract contemplated irrigation works for irrigating 2,500 acres of land, but the owners of only 500 acres signed up, agreeing to take the number of acre water rights set opposite their names, for the purpose of irrigating the 2,500 acres "pro rata," with water rights in "all essential respects" similar to a "blank form" attached, originally prepared for the owners of all the lands, the terms of the two contracts being irreconcilable, and there being no way to determine in what "essential respects" they should be read together; since there was no meeting of minds thereon.

Appeal from a judgment of the superior court for Franklin county, Holcomb, J., entered November 10, 1911, dismissing an action on contract, upon withdrawing the case from the jury. Affirmed.

Driscoll & Leonard and *Parker & Richards*, for appellant.

H. B. Noland and *Milo A. Root*, for respondent.

Gose, J.—In the spring and summer of 1909, the plaintiff was engaged in promoting a scheme whereby 4,000 acres of land, in the vicinity of Pasco, should be conveyed to Pasco Fruit Lands Company, a Washington corporation, in ex-

[1]Reported in 127 Pac. 107.

change for water rights for an equal number of acres, the water to be supplied by the plaintiff. The plan contemplated was that the plaintiff should construct an irrigation system capable of perpetually supplying water between the first day of April and the first day of October of each year, to the extent of 1½ acre feet per acre per year, for irrigating 4,000 acres of land belonging to those who should convey a like number of acres to the holding corporation. The negotiations for the accomplishment of that object were carried on between the plaintiff and a citizens' committee. The time for the completion of the plan was July 31, 1909. At that time contracts had been made for about one-half of the land only. The plaintiff then entered into a contract with the defendant and others, whereby it agreed to construct an irrigation system and they agreed to purchase water rights for 500 acres of land. Before making this contract, the plaintiff had prepared a tri-party printed contract suitable for the object first stated. The contract between the plaintiff and the defendant and other parties who, in the aggregate, agreed to purchase water rights for 500 acres of land, omitting signatures and the blank form attached, is as follows:

"Whereas, the Pasco Reclamation Co., a corporation organized under the laws of the state of Washington, has executed and is executing contracts with sundry individuals to construct an irrigation works on or before April 1, 1910, for the purpose of watering certain lands in the vicinity of Pasco, Washington, a blank form of such contracts being hereunto annexed.

"And whereas, sufficient of the contracts therein required for the conveyance of the 4,000 acres of land to the Pasco Fruit Lands Co. therein described, have not been delivered, although the time for doing so has expired.

"And whereas, it is essential that work tending to the construction of said irrigation works shall be instituted without further delay in order that such works may be completed by April 1, 1910, so that water may be then available for the irrigation of said lands.

"Now therefore witnesseth: That in consideration of the premises and of the benefits to be derived by the undersigned

through the construction of said irrigation works and as an inducement to said Pasco Reclamation Co. to construct the same, we, the undersigned, do hereby agree to purchase, or cause to be purchased, upon the completion of said irrigation works on or before April 1, 1910, the number of acre-water-rights set opposite our respective names, for the purpose of irrigating the following described lands pro rata and no others, to wit:

"The SE¼ of Sec. 20, the W½ of Sec. 28, all of Sec. 29 and S½ and NE½ and E½ of NW¼ of Sec. 30, lots 1, 7, 8 and 9, and N½ of NE¼ of Sec. 31, and N½ and lots 1, 2, 3 of Sec. 32, the N½ of NW¼ and SW¼ of NW¼ of Sec. 33, all in T. 9 N. R. 30 E. W. M. The E½ of SE¼ of Sec. 25, T. 9 N., R. 29 E., W. M.

"Provided, and this agreement is made upon the condition that said Pasco Reclamation Co. shall enter upon the work of constructing said irrigation works on or before September 1st, 1909, and that water rights which we agree herein to purchase are and shall be in all essential respects the same as those described in the blank contract hereto annexed and shall be subject to an annual maintenance charge of $5.00 per acre-water-right and to all other regulations, rules and stipulations set forth in said blank contract in so far as the same may be made to apply under this agreement, 'and that such water rights shall be at such point or points as may be mutually agreed on,' but in no event shall the said Pasco Reclamation Co. be required to deliver it over or across any of said lands which are now or which may be hereafter platted into lots or blocks.

"And we hereby agree to pay for said water rights at the rate of $100 per acre-water-right in ten annual installments of equal amounts with interest at 6% per annum, payable semi-annually, or in 5% semi-annual interest 20-year bonds of the town or city of Pasco or in such local improvement bonds as such town or city may legally issue or cause to be issued for the construction of irrigation works.

"Signature. Number acre-water-rights."

The blank form attached is the tri-party printed contract referred to. It provides:

"In consideration of this agreement and the conveyance of the above described real estate by said parties of the first part

to said party of the third part, said party of the second part, its successors and assigns, hereby agrees to, on or before April 1st, 1910, construct an irrigation system with sufficient capacity to provide and to thereafter perpetually supply water between the first day of April and the first day of October of each year, to the extent of one and one-half (1½) acre feet per acre per year or so much thereof as shall be required for irrigating the following described real estate. . . . . Said first parties, for themselves, their heirs and assigns, shall pay to said party of the second part, its successors or assigns, an annual charge for said water of Five ($5.00) Dollars per acre."

The defendant signed for a ten-acre water right, at $100 per acre, payable in ten equal annual installments. This suit is brought upon the contract to recover the first two installments and the annual charge of five dollars per acre for two years. At the close of the plaintiff's testimony, the court withdrew the case from the jury and entered a judgment of dismissal, on the ground that "the contract sued on lacks mutuality, and is so indefinite and uncertain that it cannot be enforced." The plaintiff prosecutes the appeal. The appellant completed its water system and had it ready to operate on July 1, 1910. We will assume that the evidence shows that the delay was caused by unforeseen contingencies and inclemency of the weather.

The appellant contends that the contract is a subscription contract and that its primary purpose was not to give the respondent a water right, but to induce the appellant to construct and install a pumping plant and irrigation system which would take water from the river and distribute it to the lands in and about Pasco, and thereby enhance the value of the lands of those who signed the contract.

The appellant's view is untenable. The contract plainly shows that the respondent was intending to purchase a water right for the purpose of irrigating ten acres of land. He cannot have 1½ acre feet per acre per year upon the ten acres, when the water rights purchased embrace 500 acres

and the contract specifies that the water shall be used for the purpose of irrigating certain described lands, aggregating 2,500 acres, pro rata. It is apparent that, owing to the loose method of contracting, the minds of the parties never met upon any definite settled facts. The contract recites that it is essential that the irrigation works shall be completed by April 1, 1910, so that "water may be then available for the irrigation of said lands"; that the respondent and those uniting with him agreed to purchase, upon the completion of the works, "the number of acre water rights set opposite our respective names for the purpose of irrigating" the 2,500 acres of land described in the contract "pro rata." It is conceded that only about 500 acres of water rights were purchased. The contract further recites that the water rights which the respondent agreed to purchase "shall be in all essential respects" the same as those "described in the blank contract" attached.

It is amazing that parties should make a contract and attach a blank form of contract in some important respects utterly irreconcilable with the written contract which they have signed, and then seek to put the burden upon the courts of determining in what "essential respects" the two should be read together. The two papers are so irreconcilable that they cannot be harmonized unless we rewrite the contract, and this is not a judicial function. It is true that it is the business of the court to seek to ascertain and give effect to the intention of the parties as gathered from the language of the contract, but this cannot be done in the case at bar without rejecting a part of the written contract. The respondent cannot have water to the extent of 1½ acre feet per acre per year for ten acres, when it is to be pro rated over an area of 500 acres.

We have carefully read the testimony, and have patiently endeavored to construe the contract so as to make it an enforcible instrument, but we must confess our inability to do so. We think the learned trial court was right in his

conclusion that it "is so indefinite and uncertain that it cannot be enforced."

Affirmed.

CROW, ELLIS, CHADWICK, and PARKER, JJ., concur.

[No. 10392. *En Banc.* October 22, 1912.]

J. P. M. RICHARDS, *Plaintiff*, v. CHARLES B. BUSSELL *et al.*, *Defendants*.[1]

PUBLIC LANDS—STATE TIDE LANDS—FILLS—CONTRACTS—LIEN—ACTUAL COST OF FILL—SUBCONTRACTOR'S PROFITS. Where a contractor for filling state tide lands under a contract limiting the cost to 16 cents per cubic yard, in good faith sublet the work to a dredging company at 15 cents per yard and expended 1 cent per yard in supervision and engineering, the "actual cost" to him, within Rem. & Bal. Code, § 8103, giving a lien for the actual cost of the fill, is 16 cents per cubic yard, without deducting the subcontractor's profit of 3 cents per cubic yard.

SAME—EVIDENCE OF COST—PRESUMPTIONS. The certificate of the commissioner of public lands, given pursuant to Rem. & Bal. Code, § 8103, requiring him to determine the actual cost of filling state tide lands under a state contract, is presumptive evidence of the cost.

SAME—TIDE LAND FILLS—LIENS—FORECLOSURE—ATTORNEY'S FEES. Rem. & Bal. Code, § 8103, authorizing the foreclosure of liens for the cost of filling state tide lands "in the manner provided by law for the foreclosure of liens on real estate," does not authorize the allowance of any attorney's fee other than the $10 statutory costs.

SAME—CONTRACTS FOR FILLS—LIEN—ISSUANCE OF CERTIFICATES——TIME FOR. Where two contracts for filling contiguous tide lands were entered into at the same time, with the view of excavating one general system of waterways, there being two connecting waterways, the commissioner's certificates showing the amount of the liens by reason of the completion of one of the waterways under the first contract, against certain lots covered in the second contract, but which were nearer to and deriving their benefit from the completed canal under the first contract, are not prematurely issued, although the other waterway was not completed; since the two contracts were in substance one.

[1]Reported in 127 Pac. 198.

EVIDENCE—DOCUMENTARY EVIDENCE—ASSIGNMENTS. The original assignments of tide land contracts, executed in due form and acknowledged before a notary, are competent proof of the fact of the assignments; even if they were recorded without any authority of law.

PUBLIC LANDS—TIDE LANDS—FILLS—COST OF FILL IN STREETS. Where a contract for filling unplatted tide lands, under Rem. & Bal. Code, § 8103, limited the cost to 16 cents per cubic yard, and subsequently the lands were platted, the cost of the fill in streets and alleys is to be added and charged to the abutting lands.

SAME—TIDE LAND FILLS—LIENS—COST OF WORK—CONTRACTS—PROFIT—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 8103, providing for liens in favor of the contractor filling in state tide lands for the actual cost of the work and fifteen per cent additional, provided that the lien shall not be operative for an amount exceeding the cost of the work, stated in the contract, the "cost of the work" includes the actual cost to the contractor and the added fifteen per cent allowed as his profit; hence in a contract limiting the "cost" of the fill to sixteen cents per cubic yard, it is proper, when the work actually cost the contractor 16 cents, to allow his lien therefor and 15 per cent additional.

SAME—LIENS—INTEREST ON INSTALLMENTS OF INTEREST. In an action to foreclose the lien for filling state tide lands under Rem. & Bal. Code, § 8103, providing that the amount due a contractor on certificates for filling the same shall be payable in installments, with interest from the time of the issuance of the certificate, interest is properly allowed on installments of interest past due and unpaid.

Cross-appeals from a judgment of the superior court for King county, Dykeman, J., entered January 24, 1912, upon finding the amount due on tide land certificates, in an action to foreclose liens therefor. Reversed on plaintiff's appeal.

Will G. Graves, Bausman & Kelleher, and *Graves, Kizer & Graves*, for plaintiff.

Harold Preston and *George E. de Steiguer*, for defendants.

PARKER, J.—This is an action to foreclose a number of liens upon certain tide land lots in Seattle, evidenced by certificates issued by the commissioner of public lands of the state of Washington under the provisions of the act of 1893 relating to the excavation of waterways and filling of tide

lands by private contract. A decree of foreclosure was rendered in favor of the plaintiff, but for less amounts than were evidenced by the certificates, and claimed by him. Both the plaintiff and the defendants have appealed; so to avoid confusion we will hereafter refer to them as such.

On October 27, 1894, under the authority of the Laws of 1893, p. 241 (Rem. & Bal. Code, §§ 8100-8109), the state of Washington, by its commissioner of public lands, entered into two contracts with Eugene Semple, by the terms of which he was to excavate waterways through certain lands situated within and adjacent to the corporate boundaries of the city of Seattle and, with the material taken from the waterways, fill and raise above high tide tide lands adjacent thereto then belonging to the state, and thereby become entitled to liens upon such filled in tide lands, for the amount of the cost of the filling of the same with fifteen per cent additional thereon, as provided by the act. Soon thereafter, and before doing any work thereunder, Eugene Semple duly assigned his interest in the contracts to the Seattle and Lake Washington Waterway Company, a domestic corporation. We will hereafter refer to this company as the Waterway Company. These assignments were assented to by the state, and thereby the Waterway Company succeeded to all the obligations and rights of Eugene Semple.

In the fall of 1907, the Waterway Company having caused to be completed certain portions of the excavation of the waterways and filling of the lands, the commissioner of public lands issued to it certificates reciting the completion of such parts of the work, describing the tide lands so filled in by lot and block numbers according to the official plat of Seattle tide lands, and stating in the certificates the amount of the cost of the filling in and raising above high tide of each of such lots separately, which amounts, with fifteen per cent additional thereon, were certified by the commissioner to be the amounts of the liens the Waterway Company was entitled to upon each of the lots respectively, under the con-

tracts and the law in pursuance of which they were entered into. A number of these certificates, issued in September and October, 1907, form the basis of the plaintiff's several causes of action in this foreclosure. The certificates were duly recorded in the office of the auditor of King county, and thereafter by mesne assignments became the property of this plaintiff. After entering into the contracts for the excavation of the waterways and filling of the tide lands, and before the completion of the work upon which these certificates were issued, the state contracted for the sale of the tide land lots here involved to the predecessors in interest of the defendants, and thereafter in February, 1906, by deed conveyed the lands here involved, by lot and block numbers according to the official plat of tide lands of Seattle, subject however to liens which might accrue under these contracts for the excavation of the waterways and the filling of the lots. The contracts for the excavation and filling did not in terms fix the amount of the cost of the work, but provided that,

"The entire cost of said work herein provided for, including the cost of bulkhead and seawalls, shall not exceed sixteen cents per cubic yard for each and every yard of earth put upon each tract or parcel of land to which any person or corporation has a pre-emption right of purchase, except as herein otherwise provided."

By the terms of the contracts, this limit of the cost of the work might be exceeded by the increased cost of bulkheads and retaining walls caused by such modifications of the plans and specifications therefor as might be deemed necessary to be made during the progress of the work, which modifications the commissioner of public lands was by the terms of the contract authorized to make, and "cause such increased expense to be estimated and with the approval of the Governor shall specify the sum in addition to said sixteen cents per cubic yard to which the entire cost of such work shall be limited."

After entering into the contracts, and before contracting to sell the tide lands and before the portion of the work here involved was done, the state platted the tide lands into streets, lots and blocks, and thereafter both the streets and the lots were filled under the contracts. Upon the completion of the portion of the work affecting the lots here involved, as decided by the commissioner of public lands, he determined the cost of such work to be sixteen cents per cubic yard for the filling of the lots and streets, to which he added an allowance for extra cost for bulkheads, all of which he apportioned and charged to the several lots here involved as the actual cost of the work. These several charges, so apportioned, with the fifteen per cent additional allowed by law, the commissioner certified as the amounts of the liens the Waterway Company was entitled to upon the several lots under the law and the contracts. By its decree of foreclosure, the trial court found the cost of the work to be thirteen cents per cubic yard instead of sixteen cents, as certified by the commissioner; and awarded foreclosure accordingly, allowing all other charges as determined and certified by the commissioner. Other facts will be noticed as may become necessary in our discussion of the several questions presented.

It will be convenient to first have before us the provisions of the act of 1893 relating to the excavation of waterways and tide lands by private contract. Those provisions requiring our notice, referring to them by the section numbers of Rem. & Bal. Code, are the following:

"Section 8100. The commissioner of public lands of the state of Washington may, when in his judgment the interests of commerce would be subserved thereby, enter into contract with any person or persons, or incorporated companies doing business in the state of Washington, for the excavation of any waterway or waterways through any lands belonging to the state of Washington, or to any citizen or corporation of said state, and for the filling in and raising above high tide of any tide or shore lands belonging to the state of Washington, and upon the completion of such contract such

person or persons or incorporated company shall become entitled to and shall have a lien, as in this chapter provided, upon all tide and shore lands belonging to the state of Washington, adjacent to such waterway, and remaining unsold at the date of the approval of this act, that they may fill in and raise above high tide, and all purchasers of said tide and shore lands from the state of Washington shall take the same subject to said lien."

"Section 8103. Upon the completion of the work provided for by said contract, or any part thereof, capable of separate use for the purposes of navigation, according to the terms and conditions of said contract, and within the time provided therein, or such further extension of time as may have been granted by virtue of the preceding section, the commissioner of public lands shall issue his certificate to the contracting parties, or their assigns, showing the actual cost of the filling in and raising above high tide of all tide and shore lands so filled in and raised above high tide by such completion of said work, or such separate portion thereof, and specifying and describing, with reasonable certainty, the lands so filled in and raised above high tide. Upon the filing in the office of the county auditor of the county or counties in which such lands are situated, of such certificate of the commissioner of public lands, said contracting parties shall acquire a lien, and the same shall thereupon attach, for the amount specified in such certificate, with fifteen per cent additional thereon, and with interest on such amount and additional percentage from the date of such certificate at the rate of eight per cent per annum until payment: Provided, however, that such liens shall not be operative for an amount exceeding the cost of the work as stated in the contract, . . . The amount due on such lien, or any proportionate part thereof separately payable as above provided, shall be payable by any owner of said lands, or any part thereof separately owned, as the case may be, other than the state, in ten equal annual installments, the first installment at the end of the first year after the sale of such lands, or of such separate portion thereof, by the state; and the remaining installments, one at the end of each year thereafter, with accompanying interest on each of such installments, as hereinbefore provided, to the time of the payment thereof, and such lien

may be foreclosed in the manner provided by law for the foreclosure of other liens on real estate."

"Section 8107. In ascertaining the cost of filling in and raising above high tide of any tide or shore lands, the cost of all bulkheads, and other restraining works, and the cost of filling in and raising above high tide of all streets, alleys and public squares or places, shall be apportioned to the lands benefited thereby, in addition to the cost of filling in such lands."

The principal contention made by counsel for plaintiff is that the trial court erred in its refusal to award him foreclosure for the full amount evidenced by the certificates of the commissioner of public lands, and in deciding that the cost of the work was only thirteen cents per cubic yard instead of sixteen cents, as determined and certified by the commissioner. After procuring the contracts for the excavation of the waterways and filling of the tide lands, the Waterway Company entered into a contract with the Seattle General Contract Company by which that company became interested with the Waterway Company in the contracts. Thereafter the Seattle General Contract Company in November, 1903, entered into a contract with the Puget Sound Bridge and Dredging Company, whereby that company agreed to perform certain unfinished portions of the work at an agreed price of fifteen cents per cubic yard, which contract was approved by the Waterway Company. For present purposes, we may regard this contract as being between the Waterway Company and the Dredging Company. Thereafter the Dredging Company did the excavating and filling here involved. The evidence, we think, establishes the fact that by this arrangement the actual excavation and filling cost the Waterway Company—or, we might say, the Waterway Company and the Seattle General Contract Company, its associate, which for our present purpose amounts to the same thing —fifteen cents per cubic yard; and that other work necessary to a compliance with the contracts with the state, such as supervision, engineering, etc., cost the Waterway Company

an amount equal to one cent per cubic yard for all of the material handled in the excavation and filling, thus resulting in the actual cost of the work to the Waterway Company being the maximum of sixteen cents per cubic yard specified in the contracts, aside from extra cost allowed for bulkheads. Mr. Hedges, the president and manager of the Dredging Company, testified that the excavation and filling done by that company cost it twelve cents per cubic yard, leaving it a profit of three cents per cubic yard under its contract with the Waterway Company and its associate for doing the work. Upon this evidence of the actual cost of the excavating and filling to the Dredging Company, the trial court rested its determination of the amount of the respective liens, as they should have been evidenced by the certificates of the commissioner of public lands. The trial court did not make formal findings upon this or any other question of fact; but at the conclusion of the trial, the grounds of its decision was indicated by remarks of the judge as follows:

"I do not believe that the commissioner of public lands had any knowledge that this work was done for less than the price specified in the contract, until he heard Mr. Hedges' testimony here, but it is undisputed that this work was done for less than the commissioner presumed it was being done for. There can be no question but what the work was done, as said by Mr. Hedges, for twelve cents a yard, and conceding the additional one cent a yard, the difference between those two contracts, and adding that to what it cost the Bridge Company to do the work, would make thirteen cents a yard, and if this court is correct in its theory of the case, that is the extent of the burden which should be imposed upon this property, and that will be my judgment in this case. I am not going to set aside any of these certificates. I will simply reduce them to that amount."

The contention of counsel for the defendants upon the trial, as it is here, was in substance that the allowance by the commissioner of public lands of the maximum of sixteen cents per cubic yard as the cost of the work when the actual cost of the excavating and filling was only twelve cents per cubic

yard to the Dredging Company, was such an erroneous determination of the question of the cost by the commissioner as to amount to a fraud in law upon the rights of the defendants. The trial court seemingly followed this contention only so far as to hold that the commissioner's determination of the cost of the work was only *prima facie* correct, and that that question became little else than a question for original investigation in the superior court upon foreclosure of the certificates, with the burden of proof to overcome the statement of the costs made in the certificates upon the defendants. This court has heretofore had occasion to express its views upon the force and effect of certificates of this nature issued by the commissioner of public lands. In *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845, a case involving the foreclosure of certificates issued under these same contracts, the court, at page 512, said:

"In this case, it is conceded that the state was the owner of all the tide lands in controversy at the time the act was passed, and at the time the contract to fill the same was entered into. This being true, the state could enter into any kind of a contract for filling the lands, at any price, and upon any terms. It could also designate some officer to accept the work, when such officer should deem it completed according to the contract. It could afterwards sell the land, and the purchaser would take subject to all the terms and conditions of the contract, and this is what the state did. At the time the act was passed and the waterway contract entered into, the state was the sole and exclusive owner of the lands. Appellant had no interest in any of them. Appellant's grantors had only a preference right to purchase. They had no vested or other interest. *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Mississippi Valley Trust Co. v. Hofius*, 20 Wash. 272, 55 Pac. 54. They were, therefore, entitled to no notice except such as is provided by the act or the contract. When they purchased the land from the state, they took with notice of the contract, and all the terms and conditions thereof. The commissioner of public lands is made the judge of when the contractor is entitled to a certificate, and,

in the absence of fraud, his decision is conclusive upon the appellant, as it would be upon the state if the state were still the owner. *Scholpp v. Forrest*, 11 Wash. 640, 40 Pac. 133."

In *Bussell v. Ross*, 60 Wash. 344, 353, 111 Pac. 165, and 64 Wash. 418, 421, 116 Pac. 1088, this view of the finality of the commissioner's certificates was again expressed. However, passing the question of the conclusiveness of the commissioner's certificates as to the cost of the work, it appears from the evidence in this case that the filling of the tide lands actually cost the Waterway Company and its associate the maximum of sixteen cents per cubic yard. That is, these companies paid the Dredging Company fifteen cents per cubic yard and incurred an expense in addition thereto amounting to one cent per yard in superintendence, engineering, etc. It has been suggested that there was no proof in the record showing the incurring of this extra one cent per yard expense by the Waterway Company. The answer to this suggestion is that there is no proof to the contrary, and the presumption in favor of the commissioner's certificates furnishes sufficient support for the conclusion, the burden of showing to the contrary being upon the defendants, even assuming that the trial court's view that that became an issuable fact in the foreclosure case aside from the question of fraud. We also think that the evidence warrants the conclusion that the contract by which the Dredging Company was to do the work for fifteen cents per cubic yard was entered into in good faith on the part of the Waterway Company and its associate, and that there was no collusive understanding with the Dredging Company by which it was to share any of its profits with the Waterway Company or its associate. We do not find in the record any expression of the trial court intimating a different view than this upon this question; its decision apparently being rested entirely upon the theory that the cost of the work to the Dredging Company, twelve cents per cubic yard, and the one cent per cubic yard incurred by the Waterway Company for superintend-

ence, engineering, etc., aggregating thirteen cents per cubic yard, was the correct measure of the cost of the work which should have been certified by the commissioner of public lands under the provisions of Rem. & Bal. Code, § 8103, above quoted. In other words, the trial court was apparently of the opinion that the actual cost of the work to the Waterway Company, though incurred in good faith, was not controlling upon that question. Now if the contract of the Waterway Company and the Seattle General Contract Company with the Dredging Company for the doing of the work had been shown to be collusive, resulting in the Waterway Company or its associate sharing in whatever profit the Dredging Company might make under its contract, there would be some reason for taking into consideration the cost of the work to the Dredging Company in determining the cost of the work to be certified by the commissioner of public lands. But in view of the good faith of the Waterway Company and its associate in entering into the contract with the Dredging Company to do the work for fifteen cents per yard, we are unable to see why the actual cost of the work to the Waterway Company and its associate is not the actual cost of the work contemplated by law to be certified as such by the commissioner. The state and its successors in interest, the purchaser of the land, might have grounds to complain if it were shown that the Waterway Company had entered into some collusive arrangements by which it was to share in the profits of its subcontractor, or share in the profits of some one furnishing supplies incident to the doing of the work, or had purposely performed the work or caused it to be performed in such manner as to cost it materially more than was necessary for it to expend therefor, or had by any subterfuge sought to make the cost to it of doing the work appear to be more than it actually expended therefor. But we do not think that the state, or its purchaser of the tide lands, has any further interest in the cost of the work. A reading of all of the evidence convinces us that there was no collusive

contract with the Dredging Company shown, nor does it appear that the Waterway Company could have done the work or caused it to be done for less than 15 cents per cubic yard that it and its associate paid the Dredging Company therefor, together with the one cent per yard necessarily incurred for superintendence, engineering, etc. The mere fact that the Dredging Company made a profit of three cents per yard on its contract does not show that the Waterway Company and its associate profited beyond the 15 per cent allowed them by the law, nor does it show that they could have caused the work to be done for less than this cost to them. Indeed the evidence indicates that the Dredging Company possessed peculiar advantageous facilities for doing the work not possessed by the Waterway Company or its associate, and not possessed by others in this part of the country. We conclude that the commissioner of public lands correctly determined the cost of the work to be sixteen cents per cubic yard, that being the actual cost to the Waterway Company and its associate without any collusion on their part, and that the plaintiff is entitled to a decree foreclosing its liens computed upon that basis, as it was computed and certified by the commissioner of public lands, together with interest thereon as provided by § 8103 above quoted.

Counsel for the plaintiff further contend that the trial court erred in refusing to allow them attorney's fees upon the foreclosure, other than the $10 fee allowed by the general statute. This contention is rested upon language of § 8103 providing that "such lien may be foreclosed in the manner provided by law for the foreclosure of other liens on real estate." It is argued that this language gives the right to attorney's fees upon the foreclosure of these certificates, as in foreclosure of mechanics' and other statutory liens where the statute expressly provides for attorney's fees. We are unable to agree with this contention. It seems to be fully answered by the decision in this court in *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124, where there was in-

volved the foreclosure of a lien upon real property created by a decree of divorce to secure an allowance in the nature of alimony. At page 136, the court said:

"It is next assigned as error that the court allowed respondent a counsel fee of $100. The original decree provided that the 'lien shall be foreclosed and the property sold as property is sold under foreclosure of mortgage.' It does not provide that an attorney's fee shall be recoverable as a part of the lien, and there is no agreement of the parties as to attorney's fees. Section 5165, Bal. Code, provides that the compensation of attorneys shall be left to the agreement of the parties, but there shall be allowed to the prevailing party certain sums by way of indemnity, which are termed 'costs.' Section 5172 of the same volume designates what those costs shall be. Section 5165 allows parties to make their own agreements as to attorney's fees, but, in the absence of any agreement, Sec. 5172 regulates the matter. *Potwin v. Blasher*, 9 Wash. 460 (37 Pac. 710). Since in this case there was neither an agreement concerning attorney's fees, nor a provision in the divorce decree authorizing the enforcement of a lien therefor, we think it was error to include in the decree herein an amount for attorney's fees. This is a suit to foreclose the lien for what the divorce decree created, and no more."

It seems to us that the language of § 8103 here relied upon furnishes no better support to an allowance of attorney's fees upon this foreclosure than does the language of the divorce decree involved in *Trumble v. Trumble*. This court has recognized and followed the general rule that attorney's fees are not allowable in the nature of costs, in the absence of statute or contract clearly so authorizing, in the following cases: *Larson v. Winder*, 14 Wash. 647, 45 Pac. 315; *Ditmar v. Ditmar*, 27 Wash. 13, 67 Pac. 353, 91 Am. St. 817; *Legg v. Legg*, 34 Wash. 132, 75 Pac. 130; *Criswell v. Directors School District No. 24*, 34 Wash. 420, 75 Pac. 984; *Spencer v. Commercial Co.*, 36 Wash. 374, 78 Pac. 914; *McGill v. Fuller & Co.*, 45 Wash. 615, 88 Pac. 1038. We conclude that the trial court was not in error in refusing to

allow attorney's fees other than the $10 fee taxable as costs under the general statute.

Counsel for the defendants contend that the certificates were irregularly and prematurely issued, and that the plaintiff was not entitled to have them foreclosed for any amount. There were, as we have noticed, two contracts between the Waterway Company and the state for the excavation of the waterways and the filling of the tide lands here involved. These contracts are in substance the same, differing only as to the tide lands and portions of the waterways therein described. They were executed on the same day and the commissioner has construed and treated them as one contract in substance. The waterways as described in the contracts are manifestly contemplated as being a single system of waterways, and so far as the particular portions of the waterways here involved are concerned, they may with some degree of reason be regarded as a single waterway, since they form a continuous "U" shaped waterway having its two ends connected with the harbor of Seattle upon the north. The easterly leg of this waterway is designated as the east waterway, and the westerly leg as the west waterway. The tide land lots here involved lie between these waterways and somewhat nearer to the east than to the west waterway. The lands to be filled under these contracts include all of the tide lands lying between these designated waterways and for a considerable distance to the east and west thereof. The line dividing the lands described in the separate contracts runs northerly and southerly through the land lying between these waterways, so that the lots here involved lie partly within the described land of each contract. The platting of the land into lots and blocks by the state, after entering into these contracts, resulting in this dividing line running diagonally through the block in which the lots here involved lie. The contracts are designated as contract No. 1 and contract No. 2. Contract No. 1 describes land lying east of this line, while contract No. 2 describes land lying to the west of it.

The certificates here sought to be foreclosed purport to be issued under contract No. 1, though they describe and are issued against land lying within the description of contract No. 2 as well as No. 1. The east waterway nearer to which all of these lots lie appears to have been sufficiently excavated to warrant the issuing of certificates against all of these lots under the contracts; unless it be held that the certificates should not have been issued against lots and parts of lots falling within the description of contract No. 2, because of the failure of the waterway company to sufficiently excavate the west waterway, that being within the description of contract No. 2, to entitle the Waterway Company to certificates under that contract. While some excavation was done in the west waterway, we may concede, for argument's sake, that no part of the west waterway was sufficiently excavated to become capable of separate use for navigation as was the case with the east waterway.

These facts, it is contended, render the issuance of the certificates, in so far as they are against lots and parts of lots within the description of contract No. 2, irregular and prematurely issued. If these contracts were entirely separate from, and had no relation to, each other, there would be some reason in this contention. But in view of the fact that these contracts were entered into at the same time, with the same person, with the evident view of excavating one general system of waterways, at least so far as the waterways here involved are concerned; that the east and the west waterway are so connected as to form not only one system of waterways, but in a sense one waterway; that the lots here involved are all nearer to the east than the west waterway, and will apparently derive their benefit from the east rather than from the west waterway, so far as the excavation of such waterways will confer benefits upon these lots, we are of the opinion that the certificates were not prematurely issued. We are also of the opinion that the statement in the certificates that they were issued under contract No. 1 is not, under the circum-

stances, such an irregularity as to render them ineffectual as evidencing the liens which the waterway company became entitled to by having completed a portion of the work. The case of *Scholpp v. Forrest*, 11 Wash. 640, 40 Pac. 133, is in harmony with our view that these two contracts are in substance one.

It is contended by counsel for the defendants that there is no lawful proof of the assignments of these certificates showing title in the plaintiff. The original assignments showing transfer of the certificates from the Waterway Company through its assignees to the plaintiff were received in evidence. They appear to be in due form, and are also acknowledged before notaries public in usual form. The assignments were all recorded in the office of the auditor of King county, as the certificates were. The objection seems to be that there is no statute authorizing the recording of such assignments, and that therefore the recorded assignments are not admissible in evidence. The argument seems to proceed upon the theory that these assignments are introduced in evidence as certified copies of the record in the auditor's office, and there being no statute expressly authorizing their recording such record is not legal proof. The trouble with this contention is that these are the original assignments, and we may therefore ignore their recording. They manifestly would be legal proof whether recorded or not. Their recording, even if held to be wholly unauthorized by law, is foreign to the question of their admissibility as original assignments.

It is also contended by counsel for defendants that the trial court erred in apportioning the cost of the street fill against the several lots, thereby resulting in the cost being more than the maximum of 16 cents per cubic yard of the material actually put upon each lot. This contention was decided adversely to defendants in *Bussell v. Ross*, 64 Wash. 418, 116 Pac. 1088.

It is further contended by counsel for defendants that the trial court erred in allowing the plaintiff fifteen per cent additional upon the cost of the work, since such allowance would result in the maximum cost of sixteen cents per yard allowed by the contract being exceeded. Rem. & Bal. Code, § 8103, provides for the issuance of certificates by the commissioner of public lands "showing the actual cost of the filling in and raising above high tide," etc., of the lands, and that the contractor "shall acquire a lien, and the same shall attach for the amount specified in such certificate with fifteen per cent additional thereon and with interest . . . . provided, however, that such lien shall not be operative for an amount exceeding the cost of the work as stated in the contract." This proviso is relied upon as limiting the amount of plaintiff's entire recovery in this case in any event to the sixteen cents per yard specified in the contracts. To give to this proviso the force contended for by counsel for the defendants would have the effect of entirely eliminating from § 8103 the language giving to the Waterway Company fifteen per cent additional upon the cost to it. Now these contracts do not pretend to state the cost of the work, but only the limit of cost which must not be exceeded. The word "cost" as used in this section preceding the proviso, as we have seen, manifestly means cost to the contractor aside from any profit to him. It seems plain that the contractor's fifteen per cent additional upon the cost to him, shall constitute his profits and that he shall have none other. So if the word "cost" as used in the proviso be held to mean the same, then the contractor could have no profit. We think this is not the meaning of the word "cost" as used in the proviso, but that it there means the entire cost of the work, made up of the cost to the contractor and his fifteen per cent additional. Nor do we think that the language of the contract places any different limitation than this upon the amount which the contractor or its assignee may recover upon foreclosure. We conclude that the trial court was not in error in allowing

fifteen per cent additional upon the cost of the work, even though such an allowance may result in plaintiff recovering an amount equal to more than sixteen cents per cubic yard of the material excavated and filled.

It is finally contended by counsel for defendants that the trial court erred in allowing interest upon installments of interest past due and unpaid. This conclusion of the trial court seems to be fully warranted by the decision of this court in *Mississippi Valley Trust Co. v. Hofius*, 20 Wash. 272, 55 Pac. 54, where the court said:

"Nor do we think, under modern authorities, that the third objection can be sustained, viz., that the court erred in allowing interest at seven per cent per annum upon the installment of interest which fell due February 8, 1898. Under the statute, the interest would become a distinct obligation, the time for payment being fixed by the statute. This being true, the money which was due at that date was unpaid, the state had the benefit of it, and the law will allow legal interest as a measure of damages."

Our attention is called to *Cullen v. Whitham*, 33 Wash. 366, 74 Pac. 581, a later decision which it is insisted in effect overrules the holding in the *Mississippi Valley Trust Co.* case. The later case, however, deals with a private contract, and we think is not controlling here, in view of the fact that in the former case the court was dealing with this very statute and giving it a construction which has stood since 1898, and no doubt upon the faith of which construction those interested in these contracts and certificates have relied. It really has become a rule of property as affecting these certificates, and the doctrine *stare decisis* requires that it be not disturbed, even though we might now question its correctness.

We conclude that the plaintiff is entitled to a decree foreclosing the certificates for the full amount certified therein by the commissioner of public lands as the cost of the work, with fifteen per cent additional and interest. The cause is remanded to the trial court with directions to set aside its

decree and enter a decree in accordance with this opinion.

The plaintiff will recover costs in this court.

MOUNT, C. J., ELLIS, CROW, GOSE, and MORRIS, JJ., concur.

MAIN, J., took no part.

ON RECALL OF REMITTITUR.

[*En Banc.* January 3, 1913.]

PARKER, J.—In this case the Dexter Horton National Bank was made a defendant, because of a mortgage, given to it by Bussell and wife, upon the tide lands here involved to secure indebtedness owing by them to it. By its answer and cross-complaint, the bank sought to foreclose this mortgage, and also sought foreclosure of another mortgage upon other real property, and a pledge of certain personal property given by Bussell and wife to it as additional security for the same indebtedness. The trial court, in its final judgment and decree, awarded judgment in favor of the bank against Bussell and wife for this indebtedness, and decreed foreclosure of the mortgage and pledge of property other than the tide lands involved, as well as decreeing foreclosure of the tide land certificates against the tide lands. The appeals of both Richards and Bussell and wife were taken only from so much of the final judgment and decree as awarded foreclosure of the tide land certificates. In our opinion in this case, we inadvertently omitted mention of these facts, and our direction therein to the superior court might be construed as a direction to set aside the final judgment and decree in so far as it awarded judgment and foreclosure against Bussell and wife in favor of the bank upon property other than the tide lands, as well as that portion thereof awarding foreclosure against the tide lands. We did not intend that our disposition of the cause should be so construed.

The remittitur having been recalled for the purpose of making our decision more certain in this respect, we now direct that the cause be remanded to the trial court with

directions to set aside its final judgment and decree only in so far as it awards foreclosure of the tide land certificates against the tide lands involved, and that there be entered a decree of foreclosure against the tide lands in accordance with the views expressed in our opinion. In so far as the final judgment and decree awards judgment against Bussell and wife in favor of the bank, and foreclosure of the mortgage and pledge given to the bank of property other than the tide lands here involved, the final judgment and decree will remain undisturbed.

MOUNT, C. J., CROW, ELLIS, GOSE, MORRIS, and FULLERTON, JJ., concur.

MAIN, J., took no part.

[No. 10681. Department One. October 24, 1912.]

COLUMBUS DELANO *et al.*, *Appellants*, v. F. W. LUEDINGHAUS *et al.*, *Respondents*.[1]

DEEDS—EXCEPTIONS—CONSTRUCTION AND OPERATION. Where grantors owned timber land beyond the granted land, and a sawmill to which the timber must be brought across the land conveyed, a reservation in the deed "excepting a strip of land thirty feet wide . . . for road purposes," must be reasonably construed as for the benefit of the grantor; and the use of a portion of the strip for a logging road, retaining the right of ingress and egress to the grantees, is not inconsistent with the terms of the exception clause, in view of the attendant facts and circumstances.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 22, 1912, in favor of the defendants, after a trial before the court, dismissing an action for an injunction. Affirmed.

Forney & Ponder (*W. W. Langhorne*, of counsel), for appellants.

W. A. Reynolds, for respondents.

[1]Reported in 127 Pac. 197.

CHADWICK, J.—Defendants were the owners of an irregular tract of land near the village of Dryad, in Lewis county, where they have been for some time past operating a sawmill. On September 2, 1907, defendants conveyed to one Smith, by deed of general warranty, a part of this land. The part conveyed is described by metes and bounds, and the description concludes as follows: "containing 1.21 acres more or less, excepting a strip of land thirty feet wide on the north side of said R. R. right of way for road purposes." Thereafter Smith conveyed to plaintiffs. Other tracts had been, and have since been, conveyed by respondents, and in the several deeds executed by them, a similar exception has been made. Respondents have for a long time and do now own timber lands to the west and northwest of the tract so conveyed, and have built a private logging railroad along and over the thirty-foot strip of land, over which they are transporting timber and logs to market. This action is brought to restrain defendants from further operating their logging road, and for damages; it being the theory of the plaintiffs that the exception in the deed operates as a reservation of an easement only in the grantors, and that they cannot put it to any use other than for ordinary highway purposes; that the building and operation of a steam railroad is an additional servitude which cannot be imposed without meeting those obligations which have long been adjudged to be due upon the invasion of a private right. The trial judge held that the grantors excepted a strip intending to reserve the fee, and that so long as the ingress and the egress of the grantors was not cut off, the plaintiffs were without remedy.

The ties in the logging road are laid thirty inches from the fence inclosing the Northern Pacific right of way, and are eight feet long, thus leaving a strip of considerable width between the logging road and the premises occupied by plaintiffs. The only question before us is the effect of the words "excepting . . . for road purposes." It will be noticed that the description includes the thirty-foot strip. It

is argued that this indicates a grant and reservation. Such descriptions are the most convenient, and deeds are usually made in that form whether the fee is retained or an easement only is reserved.

Much of the briefs is taken up with the discussion of the difference between an exception and a reservation. We shall not review the cases cited by either side, nor go into the primary definitions of these terms. They were defined in *Biles v. Tacoma, Olympia, & G. H. R. Co.*, 5 Wash. 509, 32 Pac. 211. The court there said, and justly so, considering the authorities, that "While it is true that there is a technical legal distinction between an exception and a reservation, it is also true that whether a particular clause in a deed will be considered an exception or a reservation depends not so much upon the words used as upon the nature of the right or thing excepted or reserved." In each case the equities of all the parties must be considered in arriving at the intent of the deed. In the case at bar, respondents owned all the land out of which the thirty-foot strip is excepted. They own timber land beyond. They operate a sawmill, which admittedly cannot be operated at the place where located without logs which must be brought to it by ordinary and customary means of transportation. And, although appellants may complain that the reservation, if it is so called, is in legal effect an implied dedication for ordinary highway purposes and cannot be used as a right of way for respondents' logging road, it is more in keeping with the probable intent of the parties to presume that respondents would not have parted with title to any part of their lands if they had understood that they would thereafter have to condemn a right of way over the excepted tract, a proceeding which might cost them more than the original value of the land sold. Reservations and exceptions are almost invariably made for the benefit of the grantor, and when so made, courts will not resort to technical rules to defeat or limit them.

The words "for road purposes" cannot be strictly construed in the light of the general rule, which is as follows:

"A reasonable construction should be given to a reservation or exception according to the intention of the parties, ascertained from the entire instrument. There should be considered, when necessary and proper, the force of the language used, the ordinary meaning of words, the meaning of specific words, the context, the recitals, the subject-matter, the object, purpose, and nature of the reservation or exception and the attendant facts and surrounding circumstances before the parties at the time of making the deed." 13 Cyc. 677.

In *Mayor etc. of New York v. New York Cent. & H. R. R. Co.*, 69 Hun 324, it was stated in the conveyance that the exception was for the uses and purposes of public streets, avenues and highways. The court held "a grantor who states in his deed that he excepts a certain portion of the land because he wants it for a certain purpose, cannot be held to have conveyed that which he has expressly excluded because he afterwards devotes it to a different purpose." See, also, *Matter of Commissioner of Public Works, of New York*, 135 App. Div. 561, 120 N. Y. Supp. 930.

But we are not required to go so far in the instant case. Nor would we be inclined to hold upon the present showing that a grantor could put the land to a use that would deprive his grantee of ingress and egress to and from his premises. Considering all the attending circumstances and the rights of all parties, our holding is that the use of the thirty-foot strip for a logging road, retaining the right of ingress and egress to the appellants, is not a use that is inconsistent with the terms of the exception clause.

Appellants have referred us to that line of cases wherein it is held that a street or highway cannot be devoted to the uses of a steam railroad without compensation to the abutting owner. Having held that the title to the thirty-foot strip is in the grantors, the respondents here, these cases have no application and will require no discussion. We are

also referred to the case of *Pacific Iron Works v. Bryant Lumber & Shingle Mill Co.*, 60 Wash. 502, 111 Pac. 578. That case was decided on the same principle upon which we have made this case rest; that is, the original intent or nature of the grant. In that case the deed was construed "as a whole and in the light of the purpose for which the grant was made," and having reference to the words granting the land, "for railway purposes, but if it should cease to be used for a railway, the said premises shall revert to said grantors, their heirs, executors, administrators or assigns," the court held, and properly so, that it was "a right of way or easement, and nothing more." There is no such expression in the deeds employed in this case. Nor are there any facts suggesting a limitation upon the exception made by the grantors.

The judgment of the lower court is affirmed.

MOUNT, C. J., PARKER, CROW, and GOSE, JJ., concur.

[No. 10702. Department One. October 24, 1912.]

NATIONAL BANK OF COMMERCE, *Appellant*, v. H. O. DREWRY *et al.*, *Respondents*.[1]

BILLS AND NOTES—HOLDER IN DUE COURSE—EVIDENCE—QUESTION FOR JURY. Upon an issue as to whether a bank was the holder in due course of a note procured by fraud, the jury is not obliged to accept as conclusive the uncontradicted evidence of an officer of the bank that they took the note without notice of any defect or dishonor; the credibility of the witness being for the jury.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered November 8, 1911, upon the verdict of a jury rendered in favor of the defendants, in an action upon a promissory note. Affirmed.

[1]Reported in 127 Pac. 102.

Geo. H. Funk, for appellant.

Thomas M. Vance and *Harry L. Parr*, for respondents.

PER CURIAM.—This action was brought by plaintiff to recover upon a promissory note, given by the defendants to McLaughlin Brothers and negotiated by them. The defense is, fraud in the procurement of the note, a failure of consideration, and that plaintiff is not a holder in good faith. From a verdict and judgment in favor of defendants, plaintiff has appealed.

We have read the evidence with some care, and although the testimony of one of the vice presidents of the plaintiff bank, who was also vice president of the Union National Bank of Kansas City, to which the note was originally sold (the Union National Bank being afterwards absorbed by plaintiff), shows that the two banks took the note without notice of any defect or dishonor, we are unable to distinguish this case from the case of *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801, and *Citizens Sav. Bank v. Houtchens*, 64 Wash. 275, 116 Pac. 866. In the *Scharpenberg* case, a like showing was made by the holder of the note. Although this court found that the testimony of the holder was not contradicted by any direct evidence, it was there said that "the jury would not have been required to take the testimony" of the holder "as conclusive proof." In that case apt authority was cited to sustain the judgment of the court, and upon that authority the court held, without qualification, that the question of good faith could not be determined as a matter of law. In the *Houtchens* case, the court said: "The evidence of this cashier, although undisputed by oral testimony of any other witness, is that of an interested witness." And further: "If the jury in weighing the evidence discredited Shinn, an interested witness, which they were entitled to do, and doubtless did, appellant failed in its proof."

Upon the authority of these cases, the judgment of the lower court is affirmed.

[No. 10616. Department One. October 26, 1912.]

J. B. DABNEY, *Appellant*, v. J. O. STEARNS *et al.*, *Respondents*.[1]

APPEAL—RECORD—STATEMENT OF FACTS—FINDINGS—REVIEW. The findings are conclusive where no statement of facts is brought to the supreme court, and if they support the judgment, it must be affirmed.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 23, 1911, upon findings in favor of the defendant, dismissing consolidated actions to set aside tax sales. Affirmed.

Bridges & Bruener, for appellant.

Morgan & Brewer, for respondents.

PER CURIAM.—On October 3, 1908, J. B. Dabney commenced three separate actions, to set aside tax sales covering certain city lots in South Aberdeen, in Chehalis county. Upon stipulation, the actions were consolidated and tried together. From an order of dismissal, the plaintiff has appealed.

The record shows, that the lots had been assessed in the name of North West Land & Improvement Company; that the certificates were issued to J. O. Stearns for delinquent taxes from 1893 to 1904 inclusive, and that Stearns instituted foreclosure proceedings against North West Land & Improvement Company (a corporation) and all persons unknown, if any, having or claiming an interest in and to the property. Appellant J. B. Dabney, who now claims title under a deed from the Northwestern Land & Improvement Company, executed and delivered to him after the tax foreclosures and sales, alleged that no service of process had been made on his grantor, the actual owner of the property, that

[1]Reported in 127 Pac. 192.

the court was without jurisdiction in the foreclosure actions, and that he had tendered to respondent all delinquent taxes, with penalty and interest thereon, and all taxes paid by respondent, with interest thereon.

In this action the trial court found, that the tax foreclosure proceedings were regular in every respect; that service of summons was made; that the lots appeared upon the tax rolls in the name of North West Land & Improvement Company as owner; that the certificates of delinquency recite the name of North West Land & Improvement Company as owner; and that the treasurer's deeds conveyed to the respondent and his wife a fee simple title.

It will be observed that appellant deraigned his title from *Northwestern* Land & Improvement Company, while the lots were assessed to, and the delinquency certificates were foreclosed in the name of, the *North West* Land & Improvement Company as owner.

The findings of the trial judge sustain the regularity of the foreclosure proceedings, and support the order of dismissal in this action. As no statement of facts has been brought to this court, the findings must be accepted as true. They sustain the judgment, which is affirmed.

[No. 9781. Department One. October 26, 1912.]

The City of Olympia, *Respondent*, v. E. M. Turpin, *Appellant*.[1]

Municipal Corporations—Street Improvements—Assessments—Proceedings. Where an act prescribing a method of levying special assessments provided (Rem. & Bal. Code, § 7873), that nothing in the act shall be construed to limit or repeal any existing powers of cities with reference to such improvements, a city was authorized, after the enactment of the law, to levy special assessments under the preexisting laws and ordinances of the city.

Same—Assessments—Notice—Appearance. Notice of a street assessment given to the owner's agent, who appeared and filed exceptions to the assessment, is sufficient to confer jurisdiction to make the assessment.

Pleading—Answer—Denial on Information. In an action to foreclose a special street assessment lien, an answer denying any knowledge on information sufficient to form a belief as to the agency of one who was alleged in the complaint to be the defendant's agent, is evasive and is not sufficient to raise any issue thereon.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered October 26, 1910, upon findings in favor of the plaintiff, in an action to foreclose a special assessment lien. Affirmed.

McCafferty, Robinson & Godfrey, for appellant.

Chas. Ethelbert Claypool (*C. E. Collier*, of counsel), for respondent.

Crow, J.—This action was commenced by the city of Olympia against Eunice M. Turpin, to foreclose a special assessment lien. From a decree in plaintiff's favor, the defendant has appealed.

Appellant owned a lot abutting upon Main street in the city of Olympia. The sidewalk in front of the lot was in a dangerous condition and bad repair. The city notified ap-

[1]Reported in 127 Pac. 210.

pellant to construct a new walk, which she failed and refused to do. Thereupon the city constructed a new walk, and to pay the expense incurred, levied the special assessment which it now seeks to foreclose. In its amended complaint, the city in substance alleged, that appellant owned the lot; that J. W. Robinson is her authorized agent; that acting under the authority of the laws of the state of Washington, and of Ordinance No. 718 of the city of Olympia, the street commissioner notified appellant to construct a new walk; that she failed to do so; that the city thereupon constructed the walk; and that the assessment was levied and confirmed, which appellant failed to pay. Appellant denied the allegations of the complaint in the following language:

"Answering paragraphs I-II-III-IV-V-VI-VII-VIII-IX-X-XI and XII, she denies any knowledge or information thereof sufficient to form a belief and hence denies the same and demands the proof, except wherein in any of said paragraphs named it is alleged by the city that notice was given to this defendant of any of the matters or things or acts therein stated, or related and as to all such allegations whether made by direct allegation or by inference she denies the same and each and every part and the whole thereof."

Appellant now contends that the authority under which the city assumed to proceed was chapter 87, Laws 1905, page 61 (Rem. & Bal. Code, §§ 7872, 7873); that Ordinance No. 718 antedated the enactment of that statute, and that the city, for the want of any ordinance providing for the application and enforcement of the statute of 1905, was without authority to exercise the powers thereby granted. Ordinance No. 718 was passed to provide for the application and enforcement of an earlier statute, enacted in 1895, and amended in 1899 (Rem. & Bal. Code, §§ 7870, 7871), which statute was not repealed by the later act of 1905. Section 2 of the act of 1905 (Rem. & Bal. Code, § 7873), expressly provides that "nothing in this act shall be construed to limit or repeal any existing powers of cities or towns with reference to the improvement or maintenance of sidewalks

. . . , but the power and authority herein granted is to be exercised concurrent with and in extension of the powers and authorities now existing . . ." The city acted with authority, under the statute of 1895, as amended in 1899, and under Ordinance No. 718.

Appellant further contends that there was not sufficient evidence to show that notice to make the improvement and notice of the special assessment were served upon her. There was some attempt to show that notices had been served upon her by mail; but assuming the insufficiency of this evidence, there was positive proof that the notices had been served upon J. W. Robinson, her alleged agent; that he, as her agent, requested the city to furnish him a written statement of the cost of the improvement, and that as her agent he later filed exceptions to the assessment. It is contended that his agency was not shown. If it be conceded that proof of his agency would have been insufficient had such alleged agency been in issue, we hold that evidence of his agency was unnecessary, as no such issue was tendered by the pleadings. His agency was expressly alleged in paragraph 4 of the amended complaint. To this allegation appellant's only denial or answer was an allegation of want of knowledge or information sufficient to form a belief. Whether J. W. Robinson was appellant's agent was a fact within her personal knowledge, and the attempted denial of the allegation of agency for want of knowledge or information was evasive and insufficient to tender an issue.

In *Raymond v. Johnson*, 17 Wash. 232, 49 Pac. 492, 61 Am. St. 908, this court said:

"Appellant's answer to the fourth allegation of the complaint is a denial of information or knowledge sufficient to form a belief as to the facts set forth in the paragraph mentioned. It will be observed that the averment is an agreement between respondent and appellant. Presumptively appellant had positive knowledge of these facts. The approved rule seems to be, when such knowledge is with the defendant,

he cannot evade a positive denial by a disavowal of knowledge."

In *Chicago, R. I. & E. P. R. Co. v. Wertheim* (N. M.), 110 Pac. 573, 30 L. R. A. (N. S.) 771, the court, citing numerous authorities, including *Raymond v. Johnson, supra*, said:

"The answer, as we have seen, was a denial on information and belief, while this tendered an issue upon some of the matters set up in the complaint, it did not have this effect as to the allegation that the defendant was operating the line of road at the place and time in question. This was a matter necessarily within the knowledge of the defendant, and as to such the law does not permit a denial upon information and belief."

Our code of procedure, Rem. & Bal. Code, § 264, provides that:

"The answer of the defendant must contain,—

"(1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; . . . ."

The privilege thus granted, to deny knowledge or information of an allegation of the complaint, is necessarily subject to the limitation that facts actually or presumably within the personal knowledge of the pleader cannot be thus denied. Under the pleadings as framed, the alleged agency stands as admitted for the purposes of this case. The answer did deny service on appellant, but the proof of service upon her admitted agent met this issue.

We find no error in the record. The judgment is affirmed.

MOUNT, C. J., CHADWICK, GOSE, and PARKER, JJ., concur.

[No. 10680. Department One. October 26, 1912.]

J. M. SAID *et al.*, *Respondents*, v. TWIN CITY LIGHT & TRACTION COMPANY, *Appellant*.[1]

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS TO PLEADINGS. A reply denying "each and every material allegation" of an affirmative defense, will be considered sufficient on appeal, where no objection or motion to make more specific was made below and it was there treated as sufficient before verdict.

STREET RAILWAYS—COLLISION—PERSONS IN STREET—CONTRIBUTORY NEGLIGENCE. Whether it was contributory negligence for plaintiff, who had one arm in a sling, to lead a horse behind a buggy, along a narrow street on which street cars were operated, depends upon the character of the horse, and where the horses were gentle and not usually frightened by street cars, the question was for the jury.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 5, 1912, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a person in a buggy through the negligent operation of a street car. Affirmed.

Forney & Ponder, for appellant.

C. A. Studebaker and *W. A. Reynolds*, for respondents.

MOUNT, C. J.—Action for personal injuries. The plaintiffs recovered a judgment against the defendant on the verdict of a jury in the court below. The defendant has appealed.

Two points are urged here, to the effect (1) that the plaintiffs' reply to the answer alleging contributory negligence is not sufficient, and (2) that the plaintiff, J. M. Said, was negligent as a matter of law. For these reasons it is contended that the trial court erred in denying the motion for a directed verdict. The answer of the defendant, after denying the allegations of the complaint, alleged:

"As a separate, further, and affirmative defense to the cause of action attempted to be set up in the complaint, de-

[1]Reported in 127 Pac. 191.

fendant avers the facts to be that any injury sustained by plaintiff, if any, as alleged in the complaint, was the result of his own carelessness and negligence, and not that of the defendant."

Plaintiff, by way of reply, denied "each and every material allegation of said affirmative defense." No motion was made to make the reply more specific, nor for judgment upon the pleadings; and the motion for a directed verdict was not based upon the fact that the reply admitted the facts pleaded in the affirmative answer. All through the trial the reply was treated as a complete denial of the affirmative matter in the answer. The plaintiffs, no doubt, intended to deny the facts pleaded in the affirmative answer, and if their reply was not sufficient for that purpose, the court, no doubt, would have permitted an amendment, if any question had been made upon the sufficiency of the reply. We think the reply should now be treated as sufficient, or that defendant has waived the question by treating the reply as sufficient, and by not raising the question before a verdict. *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. 380, 26 Am. St. 877.

It is next argued that plaintiff, J. M. Said, was guilty of contributory negligence. Without going fully into the facts, it is sufficient to say that the plaintiff was leading a horse behind a light buggy or sulky, along a narrow street upon which the defendant was operating a street car. The plaintiff had an injured arm which he carried in a sling. He was leading the horse with the well arm. His son was driving the buggy. The street car came toward them at an excessive rate of speed. The horse drawing the buggy became frightened. The motorman saw the plaintiff's plight some distance away, and when signalled to stop his car did not do so, but bore down upon the frightened horse with the gong clanging, and as a result the plaintiff was injured. The evidence also tended to show that the horses were quite gentle and accustomed to street cars and were not usually frightened by them. It is claimed by the appellant that it was negligence

for the respondent to attempt to lead a horse behind the buggy when he had an injured arm. This depended entirely upon the character of the horse and was, we are satisfied, a question strictly for the jury.

We find no merit in the questions presented, and the judgment is therefore affirmed.

PARKER, CROW, GOSE, and CHADWICK, JJ., concur.

[No. 10383. Department One. October 26, 1912.]

CANFIELD-CAULKINS IMPLEMENT COMPANY, *Appellant*, v. H. COWDEN, *Constable of Bellingham Precinct, Respondent*.[1]

SHERIFFS AND CONSTABLES—INDEMNITY BOND—RIGHT TO DEMAND—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 4003, providing that no sheriff shall be liable for damages for refusing to serve process unless an indemnity bond, "if he requires one," is first tendered, the officer has the unqualified right to demand a bond in any case requiring a levy on personal property involving the taking of actual possession, and not merely in cases where the bond "is required by law," as in Id., §§ 573 and 1888, relating to adverse claims to property levied upon.

SAME. Rem. & Bal. Code, § 4003, providing that "no sheriff, deputy sheriff, or coroner" shall be liable for damages for refusing to serve process unless an indemnity bond, if he requires one, is first tendered, applies to constables when their duties in connection with process are exactly the same as the duties of sheriffs; the terms "sheriff, deputy sheriff, or coroner" being used in a generic sense.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered December 18, 1911, dismissing an action for a writ of mandamus, upon sustaining a demurrer to the application. Affirmed.

J. F. Moore, for appellant.

Frank W. Bixby and *H. C. Thompson*, for respondent.

[1]Reported in 127 Pac. 216.

PARKER, J.—The plaintiff having recovered a judgment in a justice court against one Jensen, commenced this proceeding in the superior court praying for a writ of mandate to compel the defendant, a constable, to levy upon certain personal property alleged to belong to Jensen, the judgment debtor, under an execution issued by the justice upon the judgment, the defendant having refused to levy upon the property without the plaintiff first furnishing to him an indemnifying bond. The defendant demurred to the affidavit for the writ upon the ground that sufficient facts to constitute a cause of action are not therein stated. The demurrer was sustained by the superior court; and the plaintiff electing to not plead further, judgment of dismissal was rendered against it, from which it has appealed.

In the affidavit stating the facts upon which appellant rests its right to the writ, it alleges, in substance, that its judgment was recovered in the justice court; that execution was duly issued thereon and placed in the hands of respondent for service; that Jensen has in his possession belonging to him a stock of groceries kept by him for trade, of the value of $1,000 or more, none of which is exempt nor claimed by any third person; that respondent has been informed of these facts and of the location of the property; and that he refuses to levy upon the property under the execution until appellant, the judgment creditor, shall furnish him an indemnifying bond.

Respondent rests his claim of right to refuse to serve the execution by levying upon the property alleged to belong to Jensen upon Rem. & Bal. Code, § 4003, providing as follows:

"No sheriff, deputy sheriff or coroner shall be liable for any damages for neglecting or refusing to serve any civil process unless his legal fees and an indemnity bond, if he requires one, are first tendered to him."

Appellant argues that this section does not give the officer an absolute unqualified right to require of the judgment debtor an indemnifying bond in all cases, when requested to

serve an execution by levying upon personal property, but that the words, "if he requires one," as there used, only mean, if such a bond is required by law. That is, such bonds as are required by Rem. & Bal. Code, §§ 573 and 1888, relating to adverse claims by third parties to property levied upon. We cannot agree with this contention. These sections relate to claims made to property and to the rights and duties of the levying officer after he has levied upon the property and actually taken it into his possession. Section 4003 plainly gives him the unqualified right to require an indemnifying bond before he makes any levy, and frees him from all liability for damages arising from his refusal to make the levy, when he first requires an indemnifying bond and the same is not furnished to him. The word "requires," as used in § 4003, we think is equal to "demand." *Duhamel v. Port Angeles Stone Co.*, 59 Wash. 171, 109 Pac. 597, Ann. Cas. 1912 A. 1229.

Our attention is called to authorities in support of the view that, while an officer may demand indemnity previous to making a levy when there is some substantial reason therefor, he cannot capriciously refuse to make the levy unless indemnified. This seems to be the rule adopted by at least some of the American courts, in the absence of a governing statute. *Robey v. State, Use of Mallery*, 94 Md. 61, 50 Atl. 411, 89 Am. St. 405, and note at p. 413; 35 Cyc. 1757-1759. This view necessarily leaves the question of the reasonableness of the officer's demand for indemnity open to controversy in each particular case.

It is evident that the very purpose of our statute was to give to the officer the unqualified right to require indemnity in all cases of levy; at least in all cases of levy upon personal property which necessarily involves the actual taking possession of the property; and thus remove all cause for controversy over the question of the reasonableness of the officer's demand. The statute was evidently enacted in view of the fact that in all cases where an officer seizes property under

a process he is required to decide at his peril the question of the ownership of the property seized by him, and becomes liable in damages for the seizure of property not belonging to the defendant or judgment debtor whose property the process commands the seizure of. *Scott v. McGraw*, 3 Wash. 675, 29 Pac. 260. We are of the opinion that an officer has the unqualified right to require an indemnifying bond in all cases where he is requested to seize and take into his possession personal property under a process placed in his hands for service.

It will be noticed that § 4003 names only sheriffs, deputy sheriffs and coroners as being entitled to require indemnifying bonds, and that this proceeding is to compel a constable to serve a process. In view of the duties of sheriffs and constables being exactly the same in connection with the service of process issued from justice courts, we think that the words "sheriff, deputy sheriff or coroner," are used in a generic sense, and are intended to apply to all officers, charged by law with the duty of serving process requiring the seizure of property. It is inconceivable that the legislature intended to give the right to demand indemnity to one of this class of officers and not to others when charged by law with the performance of exactly the same duties.

The judgment is affirmed.

CROW, FULLERTON, and GOSE, JJ., concur.

CHADWICK, J. (concurring)—I am satisfied with the result of the decision of the majority, but I would prefer to rest the decision upon the broader ground that an officer may demand indemnity before making a levy, without reference to the statute. There are many cases holding that an officer is bound to serve process at his peril; and if we are to follow the statutes, it seems to me that the necessary implication of § 1888 of the code is that a constable cannot demand indemnity until a claim has been made by a third party.

Section 4003, which has been extended by construction, is a part of the Law of 1854, "An act to create and regulate the office of sheriff." I am unwilling to hold that the statute construed is broad enough to cover the right of a constable. While the rule that an officer must act at his peril, unless protected by statute, is adhered to by many courts, it is very doubtful whether it has, as is frequently suggested in the cases, the sanction of the common law. The contrary rule has been frequently laid down. In *Shriver v. Harbaugh*, 37 Pa. St. 399, it is said: "It is by common law that the sheriff has a right to indemnity before seizing goods on a *fieri facias*." In *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613, it is said: "The officer must therefore, in a proper case, and if he demands it, be indemnified by the plaintiff or other party in interest." The rule is generally laid down that, if there be reasonable grounds to doubt his authority, the officer is not obliged to serve process in civil cases at his own peril when the plaintiff is present and may take the responsibility upon himself. *Marsh v. Gold*, 2 Pick. 285; *Marshall v. Hosmer*, 4 Mass. 60; Shinn, Attachments, § 203.

Those cases holding that an officer is bound to serve at his peril are usually qualified by an admission that the officer may, if he has a reasonable or substantial doubt as to his right to levy, demand indemnity. While sustained by a great array of authority, this rule and its exception do not seem sound to me; at any rate it is abrogated in this state as to sheriffs and coroners, by statute § 4003. Whether the doubt is reasonable is a question for the jury, and must of necessity be determined after the levy has been refused, and generally in the light of subsequent events. What may appear to be reasonable to the officer might be rejected as unreasonable by the jury. If an execution defendant or a stranger can put the sheriff in position to demand indemnity by saying the property is exempt, or this property is mine, I see no reason for withholding a like protection in the first in-

stance, thus avoiding the very uncertain issue of what is a "reasonable" or "substantial" doubt.

To hold that a constable has a right to demand indemnity is in keeping with the rule laid down by this court in *Standley v. Marsh*, 1 Wash. 512, 20 Pac. 592, wherein it is said that "a promise will be implied in law from the creditor to the sheriff to hold the latter harmless of the natural results of obeying such directions." That case was decided without reference to the statute, and it would follow that an officer should have a right to insist that the liability of the execution plaintiff be sustained by proper surety and put upon surer ground than mere implication.

[No. 10817. Department One. October 26, 1912.]

THE STATE OF WASHINGTON, *on the Relation of J. S. Czerny, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.[1]

INTOXICATING LIQUORS—LOCAL OPTION—PETITION FOR ELECTION—SIGNERS—REQUISITES. The local option law, Rem. & Bal. Code, § 6294, requiring signers of the petition to give the "street and house number, if any, of his residence," and providing that no signature shall be valid unless the requirement is complied with, is mandatory and a signature to the petition failing to give the street and house number, if any, is invalid and cannot be counted in determining whether sufficient electors have signed the petition.

SAME. The local option law, Rem. & Bal. Code, § 6294, providing that every signer of the petition in a city, as distinguished from a town, shall give his "street and house number, if any, of his residence," requires him to give his street, if any, although he has no house number.

Certiorari to review a judgment of the superior court for King county, Gilliam, J., entered October 11, 1912, upon findings in favor of the defendant, dismissing an action to

[1]Reported in 127 Pac. 207.

enjoin the holding of an election under the local option law, after a trial on the merits. Reversed.

Churchill & Davis and *William A. Greene*, for relator.

Lester E. Kirkpatrick and *T. W. Bassett*, for respondent.

PARKER, J.—On September 13, 1912, the relator commenced an action in the superior court for King county, seeking an injunction against the city clerk of the city of Kent restraining him from giving a notice of election and submitting to the electors of the city the question of whether the sale of intoxicating liquors shall be permitted within the city, which the city clerk was proceeding to do in pursuance of a petition signed by certain electors of the city and filed in his office. Pleadings being filed bringing in issue certain questions of law and fact touching the legal sufficiency of the petition asking for the submission of the question to the electors of the city, the case was heard and submitted to the court upon the merits, resulting in findings of fact and judgment denying the injunction prayed for. The relator has caused to be brought before us by certiorari for review that judgment and the proceedings upon which it is rested, and prays a reversal thereof.

The local option law provides for the holding of an election upon the question of whether the sale of intoxicating liquors shall be permitted within the boundaries of any of the units defined by the law, the city of Kent being one of such units, upon petition subscribed by the qualified electors of such unit equal in number to at least thirty per cent of the electors voting at the last general election within such unit. It is further provided therein that,

"The persons signing such a petition shall state their postoffice address, the name of the precinct in which they reside, and in case the subscriber be a resident of a city, the street and house number, if any, of his residence, ... No signature shall be valid unless the above requirements are

complied with." Laws 1909, p. 153, § 3; Rem. & Bal. Code, § 6294.

The failure of thirty per cent of the electors of the city voting at the last general election to sign the petition and state the names of the respective streets of their residences, is the alleged defect in the petition rendering it insufficient in law to warrant the calling of an election, principally relied upon by the relator. Our conclusion upon the question of the sufficiency of the petition in this respect will render it unnecessary for us to notice other alleged defects in the petition. The facts determinative of this question are not in dispute, and may be briefly stated as follows:

The number of electors voting at the last general election within the city of Kent was 636. Hence, the number of required signers to a petition to warrant the calling of an election under the local option law would be 191. The petition here involved, and upon which the city clerk was proceeding to call the election, was signed by 262 persons claiming to be electors of the city. One hundred and seven of these signers did not give the name of any street upon which they resided, though they did in fact all reside upon streets having official names, so the petition was signed by only 155 persons who gave the names of the streets upon which they resided, respectively. This number, it will be noticed, is considerably less than thirty per cent of the number of electors voting at the last general election within the city, and would not be sufficient to authorize the calling of an election if the 107 signers who failed to give the streets of their residence are to be excluded. Kent is a city of the third class. It does not have a general system of house numbers, though all of its streets have official names.

It is contended by counsel for the relator that the signatures of 107 persons signed without giving the names of the streets of their residences must be excluded as invalid signatures for that reason. We are unable to escape the conclusion that these 107 signatures are invalid and must be excluded

from the petition in testing its sufficiency in so far as the required number of signatures is concerned. If it were not for the mandatory language of the law touching this requirement that the signers give the names of the streets of their residence, there might be room for arguing that such requirement is only directory. But it will be noticed that it is one of the specifically enumerated requirements, and is followed by the unqualified declarations that "No signature shall be valid unless the above requirements are complied with." The rule touching the necessity of complying with such a mandatory provision of law is stated in the text of 15 Cyc. 317, as follows:

"The courts have uniformly held that when the statute expressly or by fair implication declares any act to be essential to a valid election, or that an act shall be performed in a given manner and in no other, such provisions are mandatory and exclusive."

This rule is supported by numerous decisions of the courts there cited.

Our attention is called to the recent decision of this court in *State ex rel. Quillen v. Superior Court, ante* p. 343, 126 Pac. 899, which seems to be relied upon as a holding that the failure to give the street of the residence of the signer does not render such signature invalid. While this exact question was not discussed in that decision, it might be regarded as indicating the view of the court favorable to the contention of counsel for respondent, if it were not for the fact that a local option election in the town of Winlock was there involved, and not such an election in a city, as distinguished from a town. By the terms of the local option law, it is only when the signer of a petition is a "resident of a city," that the signer is required to state the "street and house number, if any, of his residence." It seems to us that it is not at all difficult to see that the legislature used the word "city" advisedly in this connection, and that the word was so used in its strict legal sense. By reference to the

general law relating to the classification and organization of cities and towns, we find that "municipal corporations are divided into cities and towns; cities are divided into three classes: first, second and third." We also find that municipal corporations having more than fifteen hundred inhabitants are cities, while those having a less population "shall be known as towns." Rem. & Bal. Code, §§ 7478, 7479, and 7480. And again in § 7719, the first section of that subdivision of the general law relating particularly to the organization of towns, it is provided "Every municipal corporation of the Fourth class shall be entitled the town of ———————— (naming it)." Thus it will be seen that the words "town" and "city" have a well defined statutory meaning, and are clearly distinguishable from each other. In the first section of the local option law, § 1, page 153, Laws of 1909, Rem. & Bal. Code, § 6292, we find the expression, "Each city of the first, second, third or fourth class"; also the words "fourth class towns." It is argued that this loose reference to municipal corporations of the fourth class indicates an intention on the part of the legislature to use the word "city" as including the word "town" in that part of the law prescribing the petition requirements. The language of the first section is a mere reference to the classes of municipal corporations already existing for the purpose of defining the units for holding local option elections. It is manifest that the word as used in that section in connection with the words "fourth class" is there only used as meaning municipal corporations of that class, since there are no such things as cities of the fourth class, but municipal corporations of the fourth class, which are towns as distinguished from cities. It was said in the *Quillen* case above cited:

"It is manifest that the purpose and intention of this statute was to require each petitioner to give such information relative to his place of residence, including his precinct and street number, as would enable interested parties to

readily ascertain whether he was in fact an elector residing within the unit in which the election was to be called."

It is manifest that in a town of less than 1,500 population the necessity for having the signer state his street and house number in order that it may be readily ascertained whether he is in fact an elector is of minor importance, compared to the necessity of such information being furnished by him for that purpose in a city having a large population. It would ordinarily be easy to identify an elector in a town having a small population without any such information, while such would not be the case in a populous city. And this is manifestly the reason prompting the prescribing of the petition requirements of this law. Of course there would not ordinarily be any substantial difference in this respect between a city and town which were very near the same population; but the legislature in prescribing a rule resting upon difference in population had to adopt some fixed standard, and we think it has clearly done so by this law. Having prescribed a petition requirement applicable to cities only, we must apply it alike to all cities. We therefore think that the *Quillen* decision does not hold that it is unnecessary for a signer of a petition to give the street of his residence when he is "a resident of a city."

It is contended by counsel for respondent that the words "street and house number, if any, of his residence," does not require that the signer give either, when he has no house number, even if he does reside upon a street. It seems to us that since the words "street" and "house" are connected by the conjunction "and," this contention is not sound. We are of the opinion that the words are to be construed as if they read, "street if any" and "house number if any." Not only is this the plain import of the language as we read it, but the possible evil at which the provision is directed suggests this meaning. It is well known that in the suburbs of cities there are many electors having residences which cannot be designated by house number by reason of the number-

ing system not having been extended to the suburbs, but whose residences might be designated by the names of the streets upon which such residences may front, together with the designation of their precinct. It is also well known that in cities there are a number of precincts. These precincts include a comparatively small population. This is manifest from the fact that they are supposed to contain not more than 300 voters. Rem. & Bal. Code, § 4897. A designation of a residence location by street, even in the absence of a number, would ordinarily furnish a fairly reliable guide to the place of residence of the signer of a petition claiming to be an elector, when it is remembered that he must also state his precinct. This leads us to conclude that it was the legislative intent that the signer of the petition must state the street of his residence, if his residence be upon a street, that is, fronting upon a street, even though he have no house number. To hold otherwise, would, it seems to us, remove one of the checks provided by this law upon possible fraud. We cannot, in view of the plain terms of the law, adopt a different rule for the small city of Kent than is required for a large city, though the rule may seem much more necessary in a large city.

We are of the opinion that, upon the undisputed facts in this case, the petition is not sufficient in law to authorize the calling of an election, and that the learned trial court should have granted an injunction restraining the calling and holding of an election. The judgment is reversed, with directions to the superior court to grant the injunction as prayed for.

MOUNT, C. J., GOSE, CROW, and CHADWICK, JJ., concur.

[No. 10829. *En Banc.* October 26, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Hulet M. Wells, Plaintiff*, v. KING DYKEMAN, *Judge etc., Respondent.*[1]

ELECTIONS—NOMINATIONS—PRIMARY ELECTIONS—NOMINATIONS AT CONVENTIONS—EFFECT—CONSTITUTIONAL LAW—CIVIL RIGHTS—RIGHT TO ASSEMBLE. Under Rem. & Bal. Code, § 4826, relating to the election of precinct, county and state party committeemen, and the holding of party conventions, and providing that a convention shall have no power to nominate any candidates to be voted for at any primary election, a person nominated at a convention is not thereby disqualified from afterwards becoming a candidate at the September primaries; since to construe the law to have that effect would render it unconstitutional as violating Const., art. 1, § 4, providing that the right of petition and of the people peaceably to assemble for the common good shall not be abridged.

Certiorari to review a judgment of the superior court for King county, Dykeman, J., entered October 14, 1912, prohibiting the county auditor from printing the relator's name upon the general election ballots as a nominee of the socialist party for the office of representative. Reversed.

Hulet M. Wells, for appellant.

W. J. Daly, for respondent.

MOUNT, C. J.—Writ of review. It appears that the socialist party, some time prior to the September primary election, held a convention at which nominations or recommendations were made for certain officers to be voted upon at the primary election to be held on September 10, 1912. The relator, Hulet M. Wells, was selected at this convention to be the candidate for the office of representative for the Forty-third legislative district. Thereafter, and before the primary election, he duly filed as a candidate for such office. His filing fee was paid by his party. At the primary election he

[1]Reported in 127 Pac. 218.

received the highest vote of his party for such office, and a certificate of nomination was thereafter issued to him by the county auditor of King county, and his name was about to be printed on the general election ballot as the nominee of his party for this office, when a petition was filed in the superior court alleging the facts above stated, and that his nomination was void because of the fact that he had previously been nominated by a convention. The trial court sustained this position, and issued a writ of prohibition against the county auditor. The relator thereupon sued out this writ of review of that order of the superior court.

Counsel for the respondent argues, and the trial court evidently held, that the provisions of Rem. & Bal. Code, § 4826, disqualified the relator to be a candidate at the September primary election, and that his nomination at that primary election was, therefore, of no effect. That section reads as follows:

"At the September primary each voter may write in the space left on the ticket for that purpose the name of one qualified elector of the precinct for member of the party county committee. The one having the highest number of votes shall be such committeeman of such party for such precinct. The party committee of each county shall consist of the precinct committeemen from the several precincts of such county. The state committee shall consist of one committeeman from each county, elected by the county committee, which shall meet for such purpose and organization at the court house at the county seat of each county at 2 o'clock P. M. on the second Saturday after such primary election, unless some other time and place of such meeting shall be designated by a regular call of the properly authorized officers of the retiring committee. Each political party organization shall have the power to make its own rules and regulations, call conventions, elect delegates to conventions, state and national, fill vacancies on the ticket, provide for the nomination of presidential electors, and perform all other functions inherent to such organizations, the same as though this act had not been passed: Provided, that in no instance shall any convention have the power to nominate any candidate to

be voted for at any primary election. City committeemen may be elected at municipal elections in the manner provided in this section, as near as may be."

It is conceded that there is no section of the primary law which directly disqualifies the nominee of a party convention from becoming a candidate at the primary election, but it is claimed that because the statute above quoted provides "that in no instance shall any convention have the power to nominate any candidate to be voted for at any primary election," this disqualifies such nominees. But it is apparent that this provision does not have that effect. The section has reference to the election of precinct, county, and state party committeemen. It then provides that each political party organization shall have power to do certain enumerated things and "perform all other functions inherent to such organizations, the same as though this act had not been passed: Provided, that in no instance shall any convention have the power to nominate any candidate to be voted for at any primary election." This simply means that such convention shall not have the power to make nominations and require the names of such nominees to be placed upon the primary election ballot. Such conventions are not prohibited from making nominations, but they have no power to do so. If they should do so, such nomination is of no effect. No rights are acquired or lost by such nominations, if made. To hold that a recommendation or nomination by a party convention disqualifies a candidate is to make this provision a snare and give it a meaning obviously not intended. For example: The party organization, in order to defeat a popular candidate, might call a convention and, against his will, nominate such candidate and thus disqualify him. Or one party might nominate the candidate of an opposing party, and thus disqualify him. No organized body of men could beforehand agree upon or indorse one of their number to be voted for as a candidate for office at a coming primary election without disqualifying him. These results were clearly not intended,

and the statute should not be construed so as to make such results possible. If it should be argued that the legislature intended by this provision that political parties should not have any voice in making or controlling the party nominees at the primary election, and that this provision means that political parties may not meet and make such recommendations for office as they may agree upon, then it seems plain that this provision is void because it is opposed to § 4 of art. one of the state constitution, which provides that "The right of petition and of the people peaceably to assemble for the common good shall never be abridged."

We take notice of the fact that people differ in their political beliefs. They are guaranteed the right under this provision of the constitution to peaceably assemble and to make such recommendations as they may conclude are for the common good, and to petition all other citizens to join them. This, of course, includes political parties as well as other bodies of citizens. No statute should be so construed as to make it void when it may be given a valid construction, nor should rights be taken away except by direct and positive declaration. No disqualification of candidates for office by reason of a nomination or recommendation of a party convention is found in the direct primary law, and we therefore conclude that such nomination does not disqualify a candidate who regularly files his candidacy under the primary law.

The judgment is therefore reversed, and the cause ordered dismissed. In view of an emergency in this case, it is ordered that the remittitur be sent down at once.

CROW, PARKER, GOSE, CHADWICK, and FULLERTON, JJ., concur.

ELLIS, J. (concurring)—It seems to me that the language of the majority is too broad in its reference to the constitutional provision therein discussed. It may be conceded that the right of the people to assemble, petition, discuss, and recommend, or even nominate, cannot be abridged by any legis-

lative act; but I can see no reason why the legislature may not make the solicitation or formal acceptance of such a nomination a personal disqualification to be a candidate at a primary election. Such a law would in no wise abridge the right of the people to assemble and recommend or nominate. It would be personal to the candidate. In so far as the majority opinion may be construed as foreclosing the right of the legislature to pass such a law as I have mentioned, it seems to me that the opinion gratuitously extends beyond the issue presented here. The language should be limited so as to leave no question as to the right of the legislature to make such action on the part of the candidate himself a personal disqualification. With this reservation, I concur in the result.

MAIN, J., concurs with ELLIS, J.

[No. 10822. *En Banc.* October 26, 1912.]

SAM B. HILL, *Petitioner*, v. I. M. HOWELL, *Secretary of State, Respondent.*[1]

COURTS—APPELLATE COURTS—JURISDICTION—MANDAMUS TO STATE OFFICERS—ELECTIONS—CONTEST. The supreme court has original jurisdiction to issue a writ of mandamus to the secretary of state to compel him to certify to a nomination; the jurisdiction extending to state officers who are proceeding contrary to law, although the issues involve only the private rights of individuals contesting for the office (CHADWICK and ELLIS, JJ., dissenting).

ELECTIONS—IRREGULARITIES—ELECTION BOARDS—RETURNS—REVIEW BY COURTS. Under Rem. & Bal. Code, § 4942, providing that no irregularity or improper conduct by election judges shall invalidate an election unless a person is thereby declared elected when he did not receive the highest number of legal votes, a contest of a primary election cannot prevail by reason of the fact that in one election precinct the polls were not kept open the full time and several electors were wrongfully excluded, one of whom would have voted for the contestant, or that one irregular vote was received by the

[1]Reported in 127 Pac. 211.

contestee, where making due allowance for such votes, the contestee still received the highest number of votes, and there was no showing of fraud or intentional wrong or that the irregularities influenced the final result; nor should the votes of the precinct be thrown out because the polls were closed for the noon hour without any guard over the ballot boxes, in the absence of a showing that any harm resulted (MOUNT, C. J., GOSE, and MORRIS, JJ., dissenting).

ELECTIONS—CONTEST—ELECTORS WRONGFULLY EXCLUDED. In an election contest, the vote of an elector wrongfully excluded must be counted for the candidate for whom he testifies he would have voted; but can be counted for neither candidate when it is not shown how the elector would have voted.

ELECTIONS—CONTESTS—QUALIFIED ELECTORS. In an election contest, votes shown to have been cast for a candidate by electors who could not read or write the English language, must be deducted from the number of votes cast for such candidate.

SAME—QUALIFIED ELECTORS. Electors who can read the English language sufficiently to read the names of the different candidates and mark them without extrinsic aid are qualified electors, although they are unable to read English fluently or understandingly.

SAME—CONTESTS—QUALIFIED VOTERS—EVIDENCE—ADMISSIBILITY. In an election contest, evidence that an unqualified voter had stated to the witness that she had voted for a certain candidate is inadmissible as hearsay.

Application filed in the supreme court October 15, 1912, for a writ of mandamus to compel the secretary of state to certify a nomination for the office of judge of the superior court of Douglas and Grant counties. Denied.

Merritt, Oswald & Merritt, for petitioner.

Frank Reeves and *W. E. Southard*, for respondent.

FULLERTON, J.—The petitioner, Sam B. Hill, and one R. S. Steiner were candidates on the nonpartisan judiciary ticket at the general primary election held on September 10, 1912, for the office of judge of the superior court for the district comprising the counties of Douglas and Grant; the persons named being the only candidates for such office. The county canvassing boards found from the returns of the several voting precincts of the counties that Sam B. Hill had

received 1,222 votes for the office of judge, and that R. S. Steiner had received 1,227 votes therefor, and made return thereof accordingly to the office of the secretary of state, after which the state canvassing board canvassed the returns and found the same to be correct.

The petitioner, Hill, conceiving that such gross irregularities had occurred in the manner of conducting the election in Beverly precinct, in Grant county, as to require rejection of the returns from that precinct, and that certain illegal votes had been cast and counted for his opponent in Wheeler, Quincy, Moses Lake, and Warden precincts, in Grant county, and Waterville precinct, in Douglas county, applied to this court for a writ of mandamus against the secretary of state to compel that officer to certify his name as the name of the person duly nominated at such primary election for the office of superior judge and the person whose name was entitled to be printed upon the official ballots of those counties to be used at the coming general election as the duly nominated candidate for such office, instead of the name of R. S. Steiner, which name he alleges the secretary of state intends and threatens to certify as the name of the person so duly nominated; alleging further that, if the returns from Beverly precinct be rejected and the illegal votes cast for his opponent be not counted, it will be found that he received a clear majority at the primary election.

On filing the application, this court issued an alternative writ of mandate against the state auditor, together with a commission appointing a commissioner empowered to take such testimony as either party desired to offer concerning the matters charged in the application, causing the writ to be served upon the opposing candidate, with leave to him to show any matters tending to prove the validity of his own nomination or the invalidity of that of his opponent. The commissioner so appointed heard the allegations and proofs of the parties and made and returned into this court the following findings of fact:

"(1) At the primary election for the nomination of candidates, held on September 10, 1912, there were only two candidates for the office of judge of the superior court for the counties of Douglas and Grant, said two candidates being the petitioner in this cause, Sam B. Hill, and R. S. Steiner, each of whom was and is possessed of the legal qualifications for such office and to be a candidate therefor.

"(2) There is in the County of Grant a precinct named Beverly, at which on primary election day the polls, which were in charge of E. R. Sollberg, as inspector, and Mack Morrison and ———— Broderick as judges, were held at the school house in said precinct, and were opened about 10 a. m. of that day, and up to the noon hour about four ballots had been cast. At the noon hour all three of the election officers locked the door and left the building for lunch, leaving the ballot box on the desk in the school house. Said Mack Morrison was away during the noon hour about half an hour, during most of which time he could see the polling place. He returned to the polling place, and about an hour after doing so the other election officers arrived, and the polls were kept open thereafter until about five thirty to six p. m., at which time they were closed, and the count of the votes completed about seven to seven thirty p. m., at which time the election officers left the polling place. Upon the return after noon of election officers Sollberg and Broderick, officer Morrison being already there, Morrison picked up a ballot saying it was the ballot of one Tapley, and Sollberg, who did not see Tapley that day, put that ballot into the ballot box. After the polls closed on primary election day at said precinct three persons, Howard Dyer, ———— Welch and F. A. Neal, went to the polling place of Beverly about half past six for the purpose of voting, and one of them, to wit, Howard Dyer, asked of the election board the right to vote, but was told that the polls were closed. The other two of said persons did not personally make any request to vote. There are and were on primary election day one hundred or more qualified electors at and in the precinct of Beverly.

"(3) On primary election day, September 10, 1912, there were eleven votes cast by electors voting general political tickets, ten of which also voted the nonpartisan judiciary

ticket, and in addition thereto thirteen other electors at said Beverly precinct voted the nonpartisan judiciary ticket.

"(4) One Jacob Dormaier, Sr., has lived in Grant county, Washington, nine years and cannot read the English language. One of the judges of the precinct at Wheeler precinct, at which the said Dormaier voted, instructed him how to mark his ballot, and it was by the voter marked in such a way as to be a vote for R. S. Steiner. Said ballot was cast.

"(5) One Casper Yesel has lived in the state six years; cannot read the English language; voted for judge at Quincy precinct, but does not know whom he voted for judge. Since said primary election said Casper Yesel stated to Sigismund Krenzel, a resident of Grant county, that he intended to vote for Judge Steiner, but that he did not know whom he voted for, but that he told the election judge he wanted to vote for Judge Steiner.

"(6) Thomas Chrast has been a resident of this state for fifteen years and was a voter at Moses Lake precinct, Grant county, at said primary election. Said Thomas Chrast can only read very small, short, plain words, and has considerable trouble to do even that. He voted for R. S. Steiner and marked his own ticket in doing so. Having his attention called at the time of trial to respondent's exhibit '1,' which exhibit was introduced in evidence while said Thomas Chrast was being examined, he quite readily identified and designated on said exhibit the name 'R. S. Steiner' and also the name 'Sam B. Hill.'

"(7) One John Radach has lived in the state eleven years and voted at said primary election at the precinct of Warden, in Grant county, Washington, for R. S. Steiner. He is unable to read understandingly from a portion of the reports of the decisions of the supreme court of this state, and reads rather poorly, hardly understanding it, from a second reader (school text book). He marked his own ticket at the time of voting, and being called upon while on the witness stand at this hearing, he picked out and designated readily upon request the names of R. S. Steiner, Sam B. Hill and Wallace Mount, as they appear upon the nonpartisan judiciary ticket, respondent's exhibit '1'.

"(8) Joseph Thomas Cooper, who had worked as a bartender in a saloon at Waterville, Washington, heard a Miss Hattie Cooper state to his mother that she, Hattie Cooper,

voted for Judge Steiner at said primary election. Said Hattie Cooper came from the state of Wyoming to this state, arriving at Waterville, Washington, on September 25, 1911.

"(9) Casper Yesel since said primary election did not tell one John Heather whom he wanted to vote for; and Mr. Heather told Casper Yesel how to vote; did not tell said Heather who he wanted to vote for, although Heather showed him how to mark the ballot."

At the hearing in this court on the return to the writ, counsel for the respondent questioned the jurisdiction of this court to issue the writ, or to try, in an original proceeding instituted in this court, the issues suggested by the petitioner's application for the writ. But without entering upon an extended discussion of the questions involved, a majority of the court think that the proceedings are sufficiently regular. By the express terms of the constitution, this court has jurisdiction in mandamus as to all state officers, and we have held that we have jurisdiction to issue such writs, and have repeatedly exercised such jurisdiction in cases where state officers were proceeding contrary to law, although the determination of the questions suggested by the writs involved the private rights of individuals. The most common examples of the exercise of jurisdiction in instances of this kind are found in the writs issued by this court against judges of the superior courts on the application of litigants in such courts. The writs are uniformly run against the court, notwithstanding the determination of the matters in question by the writs may involve the rights of individual litigants who are not otherwise parties to the proceedings.

On the merits of the controversy, we are of the opinion that the petitioner has not shown sufficient cause to warrant us in setting aside the returns of the canvassing boards. With reference to general elections, it is provided by statute, Rem. & Bal. Code, § 4942, that no irregularity or improper conduct in the proceeding of the board of judges, or any of them, shall be construed to amount to such malconduct as to annul or set aside any election, unless the irregularity or improper

conduct shall have been such as to procure the person whose right to the office may be contested to be declared duly elected when he had not received the highest number of legal votes.

Applying this provision of the statute to a case where the notice of an election published by the clerk of a school district notified the electors of the district that the polls would be open until 7 p. m. of the day of election instead of 8 p. m., as the statute required, this court said:

"Another reason for denying to the respondent any benefit of this mistake is, that his information contains no allegation that, had the polls been kept open an hour longer he would have been in any wise benefited by it. In all such cases there must appear some substantial reason why courts should interfere to overthrow an election, in the absence of any allegation of fraud, to the effect that, had there been a larger number of votes cast, the result would have been different." *State ex rel. Bailey v. Smith*, 4 Wash. 661, 30 Pac. 1064.

In *Williams v. Shoudy*, 12 Wash. 362, 41 Pac. 169, we held that a resolution calling for an election to be held between the hours of 9 a. m. and 7 p. m. did not avoid an election so held although the notice of election published specified that the election would be held between the hours of 9 a. m. and 6 p. m. In *Seymour v. Tacoma*, 6 Wash. 427, 33 Pac. 1059, we held that the posting of the notices of an election for twenty-six days preceding an election, whereas the law authorizing the election provided that such notices should be posted for thirty days did not vitiate the election in the absence of a showing that such irregularity in some way affected the result. *Richards v. Klickitat County*, 13 Wash. 509, 43 Pac. 647; *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. 39; *Hesseltine v. Wilbur*, 29 Wash. 407, 69 Pac. 1094.

The statute cited was enacted and the cases decided, it is true, with reference to general and special elections where

public officers were to be or were elected, or where some question was submitted for ratification or rejection by the people, and not with reference to the direct primary law, which provides only for the nomination of candidates for public offices. But it has seemed to us that the statute and the cases are in point by analogy. Surely no harsher rules should apply to the latter election than the former; and if it be legitimate in the one case to inquire whether or not the irregularity in any way affected the result of the election, it ought to be legitimate to so inquire in the other. It will be remembered that no charges of fraudulent conduct or wilful misbehavior are made or proven against any of the officers of the election who were guilty of the irregular conduct found by the commissioner. It is conceded that they acted in the utmost good faith, and that their conduct was the result of ignorance on their part of the requirements of the election statute and not from any corrupt motive. It must be remembered, also, that the candidate Steiner was in no way responsible for the acts of these officers. On the contrary, he was as blameless in the matter as was candidate Hill; and since it is evident that many legal votes were cast for him in this precinct which will be denied him if these votes are rejected—sufficient to change the result in the particular case—common justice requires that these votes be rejected and be not counted only in case the exigencies of the matter admit of no other alternative.

Turning to the immediate question, it seems to us that there is no reason to reject the returns made from Beverly precinct in their entirety. It is clear that there was but one vote that can be said to be irregular that actually got into the ballot box, namely, the vote of elector Tapley. But neither the findings of fact, nor the affidavit made by Tapley in support of the application for the writ of mandamus, although the affidavit sets forth the facts fully, show for whom the elector voted. If this was an illegal vote it was proper to show for whom the elector voted, and since the fact

is not shown, it must be treated between the parties as a legitimate vote. Neither of the candidates were responsible for the manner in which the vote got into the ballot box, and both being innocent of wrongdoing, it would be an injustice to charge the error to either of them.

Of the three persons who applied to vote after the officers of the election had closed the polls, it is found that one of them would have voted for the petitioner. As these persons were qualified electors and appeared at the polls at a time when the statute required the polls to be open, they were wrongfully denied the right to vote, and since it is found that one of these testified that he would have voted for the petitioner, the vote should be counted for the petitioner in determining whether he has been wronged by the action of the election officers. But the same rule does not apply to the other electors. None of them testified for whom they would have voted; indeed, they did not even say they would have voted the judiciary ticket at all. Again applying the rule above announced; it would be an injustice to count their votes for either party, since neither of them was responsible for the causes which denied these electors the right to vote.

But counsel argue that the vote of the precinct ought to be rejected because of the fact that the polls were closed for the noon hour, without any guard over the ballot boxes. But it is not shown that harm resulted from this fact. The door of the building in which the ballot boxes were left was locked during the interim, and there is absolutely no proof that the ballot boxes were in any manner disturbed. On the contrary, proofs or inferences are all the other way. By the statute, poll lists are required to be kept by the election officers, and the returns of the election should show a name of an elector for each ballot in the ballot box. There is no claim that there was any discrepancy in the returns in this respect, and this fact precludes the idea that the ballot boxes were tampered with during the absence of the election officers.

"Receipt of votes during the absence of some of the members of the board of judges does not vitiate the election; the law not requiring all the members to be present during all the time voting is in progress." *Packwood v. Brownell*, 121 Cal. 478, 53 Pac. 1079.

"It was no doubt the intention of the legislature that the polls should remain open during the entire day of the election, between the hours specified in the statute for opening and closing; and good policy, as well as the convenience of the voters, would seem to require that this legislative intent should be observed. But we are not prepared to say that the closing of the polls for the hour spent at dinner, by the officers of the election, in these three townships, under the circumstances disclosed in this record, is, in law, sufficient to invalidate the elections and disfranchise the voters who did deposit their ballots in the boxes. The statute in this respect may be regarded as *directory*, and a departure from the strict observance of its provisions does not necessarily invalidate the election, where it appears that no fraud has been practiced, and no substantial right violated. A case might occur that would require the entire vote of an election precinct to be set aside as invalid, but we are of opinion that this is not such a case." *Fry v. Booth*, 19 Ohio St. 25, 27.

"Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible. And it has even been held that gross irregularities not amounting to fraud do not vitiate an election. Where the legislature declares a certain irregularity in election procedure to be fatal to the validity of the returns, the court will effectuate that command. And while the conduct of election officers may, although actual fraud be not apparent, amount to such gross negligence and such a disregard of their official duties as to render their return unintelligible or unworthy of credence. But the power to throw out an entire division is one which ought to be exercised with the greatest care and only under circumstances which demonstrate beyond all reasonable doubt that the disregard of the law has been fundamental or so persistent and continuous that it is impossible to distinguish what votes are lawful and

what are unlawful, or to arrive at any certain result whatever, or where the great body of the voters have been prevented by violence, intimidation, and threats from exercising their franchise." 15 Cyc. 372.

"An election honestly conducted under the forms of law ought generally to stand, notwithstanding individual electors may have been deprived of their votes, or unqualified voters been allowed to participate. Individuals may suffer wrong in such cases, and a candidate who was the real choice of the people may sometimes be deprived of his election; but it is generally impossible to arrive at any greater certainty of result by resort to oral evidence, public policy is best subserved by allowing the election to stand, and trusting to a strict enforcement of the criminal laws for greater security against the like irregularities and wrongs in the future." Cooley's Con. Lim. (7th ed.), 934.

The conclusion reached concerning the irregularities of the election board in this precinct requires the addition of one voter to the vote of candidate Hill, reducing the majority actually returned for candidate Steiner from five to four votes. It remains to inquire whether this difference is overcome by illegal votes cast for the successful candidate in the remaining precincts. Since in this state it is the constitutional requirement that a qualified elector shall be able to read and speak the English language, it is plain that Jacob Dormaier, Sr., who voted in Wheeler precinct, and Casper Yesel, who voted in Quincy precinct, were not qualified electors, as neither of them could comply with this requirement of the constitution. One of them voted for candidate Steiner unquestionably, and we think there can be but little doubt that the other did so also. These votes must be deducted from the total counted for Steiner. With reference to Thomas Chrast and John Radach, we think they are qualified electors. They were able to read the names of the different candidates on the election ballot and to mark them without extrinsic aid. While they were not able to read English fluently, they could read it to some degree; and as the constitution does not itself lay down any restriction in this re-

gard, the courts should incline towards liberality in determining who are qualified under the rule.

With reference to the claim that Hattie Cooper voted for candidate Steiner in Waterville precinct, we think there is no sufficient proof of the charge. Were the alleged voters on trial for illegal voting, her declarations would be competent evidence against her; but we are clear that such declarations are incompetent in a contest between rival candidates in a proceeding brought to determine which of them received the majority vote. *Gilleland v. Schuyler*, 9 Kan. 569.

The necessity for an immediate decision of the question presented prevents our reviewing the many cases cited by counsel from other jurisdictions which are thought to be against the conclusion we have reached. An examination of the cases, however, has led us to believe that there is a conflict of decision on practically all of the questions involved. This being true, we prefer to follow what seems to us to be the more liberal and just rule enjoined by our own statutes and sanctioned by the decisions of this court hereinbefore rendered.

These considerations lead to the conclusion that candidate Steiner, after all votes in his favor are deducted which can be reasonably questioned, still has a majority of the legal votes cast at the primary election for the office for which he is a candidate, and is entitled to have his name certified by the respondent as such candidate. The alternative writ of mandate heretofore issued will therefore be quashed, and the application for a peremptory writ be denied.

MAIN, CROW, and PARKER, JJ., concur.

CHADWICK and ELLIS, JJ. (concurring in result)—The opinion of the court shows this proceeding to be an election contest and nothing more. This court is clearly without jurisdiction.

GOSE, J. (dissenting)—I think that Beverly precinct should be excluded in the canvass of the votes. This would give the relator a majority, and the nomination. On the other questions discussed, I agree with the view taken by the majority. Want of time prevents a discussion of the questions. I therefore dissent.

MOUNT, C. J., and MORRIS, J., concur with GOSE, J.

[No. 10370. Department One. October 28, 1912.]

FRED W. STOCKING, *as Administrator etc., Appellant*, v. MAUDE E. BOYER, *as Administratrix etc., Respondent*.[1]

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence, by a trial judge who saw and heard the witnesses, will not be disturbed on appeal.

PLEADING—AMENDMENT TO CONFORM TO PROOF—VARIANCE—MATERIALITY. In an action for trespass by the cutting of timber in which the answer pleaded payment for the timber under a written contract, it is not error to treat the answer as amended to conform to proof of payment under an oral contract, where evidence thereof was admitted without objection other than to its admission as varying the terms of the writing pleaded, and appellant had full opportunity to and did offer considerable evidence to meet it.

Appeal from a judgment of the superior court for Thurston county, Sheeks, J., entered October 9, 1911, upon findings in favor of the defendant, in an action for trespass, after a trial on the merits to the court. Affirmed.

Troy & Sturdevant, for appellant.

B. H. Rhodes and *Hayden & Langhorne*, for respondent.

PARKER, J.—This action was commenced and prosecuted in the superior court for Thurston county, by Fred W. Stocking, as administrator of the estate of Morris Brown, deceased, against Maude E. Boyer, as administratrix of the

[1]Reported in 127 Pac. 194.

estate of M. L. Boyer, deceased, to recover the value of timber cut and removed from land belonging to Brown, by Boyer during his lifetime. The case was tried by the court without a jury, resulting in findings and judgment in favor of the defendant. The plaintiff has appealed.

The trial court rendered its final decision upon the theory that the issues were broadened by the evidence beyond those strictly raised by the pleadings. In addition to a denial of the amount and value of the timber cut and removed, as alleged in the complaint, the answer affirmatively pleaded as a defense, in substance, that, in the year 1903, Boyer and Brown entered into a written contract for the sale, at an agreed price of $5,000, of certain timber upon land belonging to Brown, describing the land by metes and bounds; which contract was intended to include the timber here involved, but which timber, by mutual mistake, was not covered by the description in the written contract. It is conceded that the timber described in the written contract was taken and paid for, as agreed therein, during the lifetime of the parties. The timber here involved was taken by Boyer from land adjoining the land described in this written contract. The court found that there was no mistake in the description of the land and timber intended to be conveyed by the written contract, but found that the timber here involved was cut and taken by Boyer from the adjoining land with the full knowledge and consent of Brown, and that Boyer paid Brown in full therefor a price agreed upon between them, independent of the written contract.

The ultimate question of fact in this controversy is, Did Boyer pay Brown in full for the timber taken from the land adjoining that described in the written contract? This is the ultimate question of fact to be determined, whether we regard the issues as being defined by the original written pleadings or as broadened by the evidence introduced. The argument of learned counsel for appellant is addressed very largely to their claim of error on the part of the trial court

in that the evidence does not support its findings in favor of respondent upon the questions of the taking of the timber by Boyer with the consent of Brown and the payment therefor by Boyer. The testimony is in conflict upon these questions, and we deem it sufficient to say that we have carefully read the entire record and are convinced therefrom that the court was fully warranted in making the findings it did upon these questions. Several statements made by Brown in his lifetime in the presence of disinterested witnesses, showing his knowledge of and consent to the taking of this timber by Boyer and receipt of payment therefor in full from him, were testified to by such witnesses, while there was testimony of other witnesses tending to the contrary. This involved simply a question of the credibility of witnesses. We think, however, a reading of the entire evidence leads to the conclusion that the preponderance of the evidence was in respondent's favor, even viewing it, as we must, in written form only. This, of course, presents a condition which precludes us from interfering with the findings of the trial judge, who saw and heard the witnesses testify, and thereby had a better opportunity to judge of their credibility than we have.

At the close of the trial, in announcing its decision upon the merits, the court indicated its findings as above noticed, and directed that the pleadings be amended accordingly; that is, so as to make the question of payment for the timber aside from payment under the written contract set up in the original answer, an issue in the case. This, it is contended, was error on the part of the court. Certain of the evidence was admitted over the objections of counsel for appellant, but such objections were directed to the claimed inadmissibility of the evidence upon the ground that it tended to vary the terms of the written contract pleaded in the answer. In so far as this evidence may not have been admissible upon this ground, we think the record warrants the conclusion that the court disregarded it, or else it was rendered free from prejudice by reason of the fact that the court found in appellant's

favor upon the question of alleged mistake in the written contract. In so far as it tended to prove payment for the timber independent of that contract, it was objectionable, if at all, only because it tended to broaden the issues raised by the written pleadings. We do not find objections in the record to the evidence upon this ground; at least, the record does not clearly so show. It is manifest that there was no prejudice against the rights of the appellant in the admission and consideration of this evidence by the court viewing the issues in this light. Counsel for the appellant apparently had all the opportunity desired for meeting this evidence upon this theory, and in rebuttal offered a considerable number of witnesses to prove facts inconsistent therewith. We think this case falls within the spirit of Rem. & Bal. Code, § 299, which reads:

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits."

We are of the opinion that there is no prejudicial error shown, and that the cause was correctly determined upon the merits. The judgment is affirmed.

MOUNT, C. J., CROW, GOSE, and CHADWICK, JJ., concur.

[No. 10660. Department One. October 28, 1912.]

H. C. LACKEY, *Appellant*, v. BIG CREEK TIMBER COMPANY, *Respondent*.[1]

MASTER AND SERVANT—FELLOW SERVANTS—SAFE WORKING PLACE—VICE PRINCIPALS. An engineer of a donkey engine, and his fireman working under his control in repair work on the engine, are not fellow servants, with reference to the engineer's duty to make the working place safe by closing the globe valve of the engine so as to prevent its starting by accidental contact with the throttle lever while working at the repairs; since the same was a nondelegable duty of the master, making the engineer a vice principal with respect thereto.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered August 30, 1912, upon granting a nonsuit, dismissing an action for personal injuries sustained by a fireman of a donkey engine. Reversed.

Govnor Teats, Hugo Metzler, Leo Teats, and *Ralph Teats*, for appellant.

Reeves Aylmore, Jr., for respondent.

PARKER, J.—This is an action to recover damages for personal injuries, alleged to have resulted to the plaintiff from the negligence of the defendant timber company while he was employed as a fireman for its donkey engine. At the conclusion of the plaintiff's evidence introduced upon the trial, the court granted the defendant's motion for a nonsuit, and dismissed the action upon the ground that the plaintiff's injuries were caused by the negligence of the engineer while acting in the capacity of a fellow servant of the plaintiff, if such injuries were caused by the negligence of any one other than the plaintiff himself. From this disposition of the cause, the plaintiff has appealed.

The facts material to our present inquiry may be sum-

[1]Reported in 127 Pac. 190.

marized from the evidence introduced in behalf of appellant as follows: On April 17, 1911, appellant's brother, Thomas Lackey, was in the employ of respondent as an engineer in charge of one of its donkey engines. In pursuance of special authority then given him so to do, he on that day employed appellant as fireman for the same engine. Appellant continued to work for respondent in that capacity until September 17, 1911, when he received the injuries for which he seeks recovery in this action. He worked with his brother Thomas Lackey, Clarence Norton, and Roy Clark, each of whom succeeded to the position of engineer in this order. Appellant was under the engineers and subject to their superintendence and control. While the engineers did not have the unqualified power of employing and discharging firemen, such employing and discharging were subject to the recommendation of the engineers. There was a general foreman over all the employees, including the engineers.

On September 2, the engine was running, and appellant performing his usual work of firing until the noon hour. During the forenoon, the engine had become disabled, and needed repairs which it was evident it would take some little time to make. As appellant was starting away from the engine to dinner, the engineer Clark directed him to come back after dinner and help repair the engine, and to bring with him a jack screw. Upon his return after dinner with the jack screw, he found the engineer and W. A. Hastie, another employee, at work upon the engine. He proceeded to help them as directed, and after they had been working for a time, appellant was directed by the engineer to hold in place a drill which was being used to drill a hole in a shaft upon the engine. In performing this duty, appellant was required to take a position very near the throttle lever of the engine. While in this position, and while the engineer was turning the drill, appellant accidentally came in contact with the throttle lever, causing the throttle to open and admit steam into the engine. This started the engine, and before it could

be stopped, appellant's foot was caught in the machinery and injured. There was a globe valve in the steam pipe leading from the boiler to the engine, for the purpose of shutting off the steam from the engine. Two experienced engineers testified, in substance, that it is dangerous to work with the machinery about the engine when steam is in the boiler unless the globe valve is closed; and that it should then be closed to prevent the possibility of an accidental starting of the engine by something coming in contact with the throttle lever. Appellant knew of this danger, but says he supposed the globe valve had been closed by the engineer before he arrived after dinner. We have noticed that the engineer and Hastie were at work upon the engine before appellant arrived. The globe valve was just above a low roof covering the engine, and could not be seen from where the men were working. It was not the duty of the fireman to attend to the closing of the globe valve unless he was specifically directed so to do by the engineer.

We have noticed that the trial court granted the nonsuit upon the theory that the engineer and appellant were fellow servants. The correctness of the decision upon this theory is the only question presented in the briefs of counsel. We are unable to agree with the view of the learned trial judge upon this question; that is, that respondent was relieved of responsibility for appellant's injuries because he was a fellow servant with its engineer with whom he was working. The facts we have above summarized, it seems to us, would warrant a jury in concluding, that the failure of the engineer to see that the globe valve was closed while the men were working upon the engine was an act of negligence on his part, in view of the supervision and control he was there exercising in behalf of respondent over both the appellant and the engine; that the closing of the globe valve on such an occasion was such a necessary act in rendering the engine and the place safe as made it under the circumstances a nondelegable duty on the part of the respondent, and that the

failure to close the globe valve was the proximate cause of appellant's injuries. In the case of *Dyer v. Union Iron Works*, 64 Wash. 577, 117 Pac. 387, stating the view of this court as deduced from its previous decisions, it was said:

"We have held that where a master employs a number of servants to work with a dangerous agency and gives to one servant exclusive control of the agency with power to direct where the other servants shall work and the manner in which they shall work, the one given control is the representative of the master, that his negligence is the negligence of the master, and any one injured by reason of such negligence, not contributed to by him, has a cause of action against the master for the injury so suffered."

See, also, *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324, 58 Pac. 244; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Dossett v. St. Paul & Tacoma Lum. Co.*, 40 Wash. 276, 82 Pac. 273; *Eidner v. Three Lakes Lumber Co.*, 45 Wash. 323, 88 Pac. 326; *Keller v. White River Lumber Co.*, 66 Wash. 153, 119 Pac. 4.

We are of the opinion that the engineer was a vice principal, at least in respect to the safety of the place in which appellant was working in so far as the safety of the place was dependent upon the closing of the globe valve.

We conclude that the judgment must be reversed and appellant granted a new trial. It is so ordered.

MOUNT, C. J., CROW, GOSE, and CHADWICK, JJ., concur.

[No. 10411. Department One. October 28, 1912.]

FRANK M. CARNAHAN, *Respondent*, v. PAUL H. MOORE, *Appellant*.[1]

FRAUD—DECEIT—MISREPRESENTING PRICE PAID—MEASURE OF DAMAGES. Where defendant induced plaintiff to purchase, with him, certain lands by misrepresenting the price paid, the plaintiff can recover damages for the deceit, the measure being the difference between the price paid by defendant and the price paid to him by the plaintiff; the value of the land being immaterial as the plaintiff is entitled to his profit.

FRAUD—DECEIT—EVIDENCE—ADMISSIBILITY. In an action for damages for deceit in misrepresenting the price paid by defendant for a forty-acre tract of land, one-half of which was taken by the plaintiff, evidence of similar representations to another party who took the other half of the land is admissible as tending to show the representations made to the plaintiff, where the two sales were parts of one and the same transaction.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered November 25, 1911, upon findings in favor of the plaintiff, in an action in tort, after a trial on the merits to the court. Affirmed.

Hayden & Langhorne, for appellant.

Fletcher & Evans, for respondent.

CROW, J.—Action by Frank M. Carnahan against Paul H. Moore, to recover damages arising out of fraud and deceit. From a judgment in plaintiff's favor, defendant has appealed.

The evidence shows, that respondent, who came to the city of Tacoma as a stranger in the latter part of the year 1909, had some funds which he desired to invest in real estate; that, in the early part of April, 1910, a mutual friend introduced him to one Judson, who with appellant Moore was then engaged in the real estate business; that respondent told Judson he desired an investment which Judson could recommend, and

[1]Reported in 127 Pac. 195.

which could be readily turned at a profit; that Judson repeated this conversation to appellant; that, at the time, appellant had listed for sale, at $350 per acre, a 40-acre tract of land west of Tacoma, owned by C. S. Barlow and others, the record title to which then stood in the name of one Wilson; that, during the latter part of April, appellant told Barlow he could not sell the 40-acre tract for more than $9,500; that Barlow, on behalf of himself and associates, thereupon consented to sell it for that sum, and executed an agreement or option to Elizabeth B. Towle, appellant's mother; that about the same time, appellant directed respondent's attention to the tract, telling him it was a good investment, that it could be bought for $350 per acre, but that the owners would sell no part of it unless they could sell it all; that he had found a railroad man who would take the south 20 acres; that, if respondent would join appellant, they could purchase the north 20 acres at $350 per acre, and hold it together for sale at a profit; that on May 4, 1910, respondent accepted appellant's offer, paid him $2,250, and assumed $1,250 of a mortgage on the land; that, when this payment was made, appellant told respondent he desired to hold the title to his share in the name of his mother, Elizabeth B. Towle, and that it would be necessary to obtain her consent before closing the deal; that on May 7, 1910, appellant procured a conveyance of the 40-acre tract to his mother, Elizabeth B. Towle; that he paid Barlow and associates only $8,353.05; that for a stated consideration of $10, he, on May 10, 1910, caused Mrs. Towle to convey the land to him; that on the same day he conveyed an undivided half of the north 20 acres to respondent; that later he conveyed the south 20 acres to one Daub, the railroad man whom he had mentioned, and that, to induce Daub to make the investment in the south tract at $350 per acre, appellant made the same representations he had made to respondent. The decrease in the price at which appellant purchased the 40 acres from $9,500 to $8,353.05, was procured by appellant on account of a right

of way, and platted streets which occupied a portion of the land. The contract of sale from Barlow and associates, and later a deed from Wilson, were procured by appellant in the name of Elizabeth B. Towle, and a contract was given to respondent by appellant as her agent and in her name. Respondent contends, and the trial court found, that the use of the name of Mrs. Towle was a subterfuge to conceal the fact that appellant was himself purchasing the land from Barlow and associates, and that he was paying less than $350 per acre. The controlling question on this appeal is whether this finding should be sustained.

Upon reading the evidence, we conclude, that Mrs. Towle had no interest in the transaction; that the purchase from Barlow for $8,353.05, the execution of the deed from Wilson to Mrs. Towle, the execution of the contracts with appellant and Daub for sales to them at $350 per acre, the payment of the purchase money by respondent and Daub, and the execution of the deed from Mrs. Towle to appellant, all occurred within a brief period of time and were the several parts of one completed transaction. We conclude, that appellant was buying the land for himself and also for respondent and for Daub, who more than paid the entire purchase price, that from money received from them, appellant only paid a little more than $208 per acre for the land, although he at the time told respondent and Daub the land was actually costing him $350 per acre; that respondent and Daub both relied upon his representations; and that he defrauded respondent to the extent of $1,411.15, for which judgment was entered.

Upon these facts respondent is entitled to recover. Appellant contends that the land was purchased by Mrs. Towle and then sold to respondent. This contention is not sustained by the evidence. He further insists that respondent has not shown the land was of less value than $350 per acre, that he has not rescinded the contract, that no damages have been proven, and that he should not recover. This is an action for deceit and misrepresentation. Respondent was purchas-

ing with appellant, and was entitled to obtain his interest in the land at the price appellant was paying. Under such a state of facts, the correct measure of damages is the difference between the price paid by appellant and the price paid to him by respondent. The value of the land is not an issue, as respondent is entitled to whatever profit there may be in the investment over and above the actual cost. *Jameson v. Kempton*, 52 Wash. 106, 100 Pac. 186; *Hinton v. Ring*, 111 Ill. App. 369; *Johnson v. Gavitt*, 114 Iowa 183, 86 N. W. 256; *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40; *Bergeron v. Miles*, 88 Wis. 397, 60 N. W. 783, 43 Am. St. 911.

Where one party induces another to purchase land by misrepresenting the purchase price and agreeing that he will himself purchase an undivided half of the land at the price stated, the party making such false statements and representations will be compelled to account to his copurchaser on the basis of the entire benefit he may have received in buying the land, as he will not be permitted to charge his copurchaser a price in excess of that which he himself has paid. *Kennah v. Huston*, 15 Wash. 275, 46 Pac. 236; *Mayo v. Wahlgreen*, *supra*.

Respondent was permitted to introduce a deposition of Mr. Daub, the railroad man, who testified to similar statements and representations which appellant made to him about the same time, with reference to the 40-acre tract and its cost. Appellant insists the deposition was improperly admitted. The sale to Daub and the sale to respondent were parts of one and the same transaction, and it was competent to show appellant's misrepresentations and false statements to Daub, as tending to support the respondent's contention that similar representations were made to him. *Oudin v. Crossman*, 15 Wash. 519, 46 Pac. 1047.

The judgment is affirmed.

MOUNT, C. J., GOSE, CHADWICK, and PARKER, JJ., concur.

[No. 10497. Department Two. October 29, 1912.]

TONY BERENS, *Appellant*, v. GUY COX *et al.*, *Respondents*.[1]

APPEAL—REVIEW—FINDINGS—EXCEPTIONS—NECESSITY. Findings in an equity case, to be reviewed, must be excepted to; but failure to except is not ground for striking the statement of facts where the error assigned is in the rejection of evidence.

APPEAL—REVIEW—HARMLESS ERROR. In an equity case, it is not reversible error to exclude evidence where the facts so far as material were shown by other evidence.

EVIDENCE—CROSS-EXAMINATION—ORDER OF PROOF. Upon cross-examination, it is proper to exclude documentary evidence which was no part of the cross-examination, even if it were admissible at some other time.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 10, 1912, upon findings in favor of the defendants, in an action to set aside a sheriff's sale. Affirmed.

Frank S. Carroll, for appellant.

Frank D. Nash, for respondents.

MORRIS, J.—This is a suit in equity, to set aside a sheriff's sale, and decree appellant to be the owner of certain real property. At the conclusion of the hearing, relief was denied appellant, and in due time thereafter findings and decree were entered in favor of respondents, from which this appeal is taken. The errors assigned are in the admission and rejection of evidence, the findings, and decree.

Appellant took no exceptions to the findings, and for this reason respondents move to strike the statement of facts. In contesting this motion, appellant suggests that, inasmuch as findings are not required in equity cases, exceptions thereto are unnecessary. It must be admitted that, under our practice, findings are not necessary in equity cases; but this

[1]Reported in 127 Pac. 189.

does not disturb the uniform rule that, where findings are made, exceptions must be taken to them in the proper manner to obtain a review of them in this court. It does not follow, however, that the statement of facts should be stricken because of such failure, when, as here, any part of the error relied upon is the rejection of evidence. It might be that the facts as found by the court are properly found under the evidence admitted, and there is no occasion to take exceptions to facts admittedly correct in the light of the evidence received; whereas evidence excluded by the court might, if admitted and considered, change the character of the findings. Hence, it has been held in *Schlotfeldt v. Bull*, 17 Wash. 6, 48 Pac. 348; *Lilly v. Eklund*, 37 Wash. 532, 79 Pac. 1107; *Bringgold v. Bringgold*, 40 Wash. 121, 82 Pac. 179; *Smith v. Glenn*, 40 Wash. 262, 82 Pac. 605; *Pederson v. Ullrich*, 50 Wash. 211, 96 Pac. 1044, that, even though exceptions were not properly taken to the findings, this court would refuse to strike the statement of facts when it appears that error is alleged in the exclusion of evidence.

The motion to strike the statement of facts will, therefore, be denied; but the objection to its consideration must be sustained, in the light of the failure to take exceptions to the findings, as to everything therein contained except those portions that have to do solely with the ruling of the court in rejecting evidence. This is the rule announced in the above cases, and it must be regarded as the settled rule of this court.

We have, therefore, reviewed these rulings as excepted to by appellant and now urged as error, and find no reversible error in them. In two instances in which exception is taken, we find the same facts sought to be shown appearing to the extent of their materiality in other parts of the record. In the other instance, the court properly excluded some documentary evidence which it was sought to introduce as part of the cross-examination of one of respondents' witnesses. The proffered evidence was no part of the cross-examination,

and its rejection by the court was proper. Whether it would have been proper to receive this evidence at some other time, we are not called upon to say, since it was not again offered.

Finding no reversible error in any ruling we are permitted to review, the judgment is affirmed.

MOUNT, C. J., ELLIS, MAIN, and FULLERTON, JJ., concur.

[No. 10358. Department Two. October 29, 1912.]

A. P. MUNSON, *Trustee, Appellant*, v. LOUIE GUNDER, *Sometimes Known as Louis Gonter, et al., Respondents.*[1]

CORPORATIONS—STOCK—SUBSCRIPTION—TRUSTEE OR AGENT. Where one subscribed for stock as a trustee for certain creditors, it is immaterial to his liability on his subscription, so far as third persons dealing with the company are concerned, whether the creditors consented or not, since the subscriber was the owner, either as trustee, or as an agent who subscribed in his own name.

CORPORATIONS—STOCK—SALE—ACTION FOR PRICE—INSTRUCTIONS. In an action for the price of stock sold, in which the only issue is whether defendant agreed to buy it from the original subscriber, it is prejudicial error to instruct that the defendant would not be liable to the plaintiff if he subscribed for or agreed to take the stock of the company and pay it therefor; since it injected an immaterial matter as potentially determinative of the case.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 23, 1912, upon the verdict of a jury rendered in favor of the defendants, in an action on contract. Reversed.

Bates, Peer & Peterson, for appellant.

Frank S. Carroll, for respondents.

ELLIS, J.—This is an action to recover from the defendants, respondents here, the sum of $2,000, alleged to be the agreed purchase price of 100 shares of the capital stock of Puyallup Veneer & Mill Company, a corporation, sold to

[1]Reported in 127 Pac. 193.

them by the plaintiff. The complaint alleges that the plaintiff, on December 2, 1909, sold the stock to the defendants, that the stock was of a par value of $20 a share, and that the defendants agreed to pay $2,000 for the 100 shares. The answer denies these allegations, and sets up as an affirmative defense that the plaintiff gave the stock to the defendant Louis Gonter, in consideration that he go with the plaintiff through the Puyallup valley and aid the plaintiff in selling other stock of the corporation. This affirmative matter is traversed by the reply.

The following facts were established by uncontradicted evidence: some time prior to the month of December, 1909, the plaintiff and one Sandberg were the principal stockholders and officers of a corporation known as Washington Veneer Company; the former was secretary and general manager, the latter president. The mill of that company burned, and the corporation was reorganized under the name of Puyallup Veneer & Mill Company, which took over the assets and assumed the liabilities of the old company. The plaintiff was secretary and manager of the new company and Sandberg was its president. The par value of the stock of the new company was $20 a share. The old company, at the time of this transfer and assumption, owed debts aggregating about $55,000. Upon the reorganization, 2,750 shares of the capital stock of the new company, par value $55,000 were subscribed for and issued to the plaintiff, as trustee for the creditors of the old company whose debts were assumed by the new. The plaintiff testified that he took this stock for the purpose of sale to pay these creditors. It does not appear whether these creditors assented to this arrangement or not; but in our view of the legal effect of the transaction, it is immaterial to the issue here whether they did assent or not. The 2,750 shares of stock were subscribed for and issued. If the creditors whose debts were assumed did assent, then they owned the stock, and their rights as creditors of the old company were merged in their rights and duties as beneficial

owners of these 2,750 shares of stock in the new. If they did not so assent, then the plaintiff, as it seems to us, occupied a position analogous to that of an agent who has subscribed for stock in his own name; he, so far as third parties are concerned, may be held as a subscriber for the stock. 1 Cook, Stock & Stockholders (3d ed.), § 249. Both he and the other organizers of the new company who participated in the transaction would be estopped as to third parties to deny that the stock was subscribed for, in either event. It is a part of this stock which is the subject of the present controversy. The cause was tried to a jury, and from a judgment entered upon a verdict in favor of the defendants, the plaintiff has appealed.

The court, among other instructions, gave the following:

"But, if you find from the evidence, that the defendant, Louis Gonter, subscribed for or agreed to take of the Puyallup Veneer & Mill Company 100 shares of the stock of said company and pay it therefor, then and in that event the plaintiff is not entitled to recover in this action, and your verdict must be for the defendant."

The giving of this instruction is the chief error assigned. The stock which the defendant purchased having been subscribed for and issued, the transaction, so far as the defendants are concerned, was a purchase of the stock from the plaintiff; and as between these parties, the defendants are liable for exactly what they contracted to pay for the stock, no more and no less. This was a question of evidence and is the only disputed question in the case, since the subscription for an issuance of the stock to the plaintiff and the purchase by and delivery of the stock to the defendants was not disputed. Whether, at the instance of creditors of the Puyallup Veneer & Mill Company, either the defendants or the plaintiff might be held as subscribers for the stock is a matter foreign to the issues here. An immaterial matter having been submitted to the jury as potentially determinative of the case

by the instruction complained of, the giving of that instruction was manifestly prejudicial error.

The judgment is reversed, and the cause is remanded for a new trial.

MOUNT, C. J., MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10550. Department Two. October 29, 1912.]

C. C. CHANDLER *et al.*, *Appellants*, v. THE CITY OF PUYALLUP *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—NOTICE—WAIVER—JURISDICTION. Failure to publish the initial resolution for an assessment twice, as required by Rem. & Bal. Code, § 7705, is waived by parties appearing to protest against the assessment, where no objection was made at the time to the sufficiency of the notice; since the notice is not jurisdictional in the absolute sense that it could not be waived.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 2, 1911, dismissing an action to quiet title, after a trial on the merits. Affirmed.

F. R. Baker and *F. D. Davis*, for appellants.

M. F. Porter and *W. H. Pratt*, for respondents.

ELLIS, J.—The plaintiffs brought this action to quiet title to their respective properties against certain special assessments, levied thereon by the city of Puyallup for street paving. Upon a hearing, the action was dismissed by the superior court at the plaintiffs' cost. The plaintiffs have appealed.

The appellants contend that the city council was without jurisdiction to make the assessment, because only one publication of the initial resolution was made, whereas the statute, Rem. & Bal. Code, § 7705, requires two publications. This is the only objection urged against the validity of the

[1]Reported in 127 Pac. 293.

assessments. It is not claimed that the work was not done, nor that the appellants' properties were not benefited thereby. We think the evidence sufficiently shows that the resolution was published only once, but it does not follow that the proceedings were void. While the records of the city council are not in evidence, the city clerk was permitted to testify from them. The time set for remonstrances by the resolution was April 28, 1909. This appeared in the resolution as published. At that time, as the clerk testified, a remonstrance was presented "by citizens," asking the council to defer action, and the matter was continued for one week. On May 5, 1909, the time to which the hearing was continued, "a remonstrance from owners of property within bounds of the proposed district" was considered and discussed by persons both for and against the adoption of the proposed district as outlined in the resolution, and the council overruled the remonstrances. It does not appear from the evidence whether the protestants were these appellants or other property owners. The appellants, however, in their brief admit that they appeared and protested, and that their protests were overruled. Nowhere in the evidence does it appear, nor do the appellants in their briefs claim, that the objection now urged was ever made before the city council or called to its attention. Having admittedly appeared in response to the defective notice, it was incumbent upon them to show that they then objected to the sufficiency of the notice. Otherwise we must treat that objection as waived, unless the failure to publish the notice twice was jurisdictional in the absolute sense that it could not be waived in any manner. There is much reason in the view that this notice has nothing to do with the constitutionality of the law. Its purpose was not to accord a hearing upon the validity of the assessment or as to the benefit therefrom to the property within the district, but to accord a hearing as to the limits of the district and as to whether the district should be formed at all. The publication of the initial resolution or ordinance antedating as it

does any assessment, cannot affect the constitutional requirement as to due process of law one way or another. The constitutional requirement is met by the fact that the lien of the assessment, if questioned, can only be asserted and the property subjected to its payment by a suit in foreclosure. Rem. & Bal. Code, § 7710.

But even assuming that the constitutional inhibition necessitates some notice of the initiation of the improvement, the constitution does not prescribe any particular form of notice. In view of that fact, the legislature might have provided for but one publication of the initial resolution, or might have provided for any other form of notice reasonably calculated to apprise the property owners of the intended improvement. To proceed under an imperfect publication was not to proceed without power. It was merely an irregular exercise of power. The appellants who actually appeared before the council in response to the notice, but failed to offer any objection as to the sufficiency of the notice, must be held to have waived that objection. *Rucker Bros. v. Everett*, 66 Wash. 366, 119 Pac. 807, 38 L. R. A. (N. S.) 582; *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010; *Shannon v. City of Omaha*, 73 Neb. 507, 103 N. W. 53, 106 N. W. 592; *Owens v. Marion*, 127 Iowa 469, 103 N. W. 381; *Philadelphia v. Schofield*, 166 Pa. St. 389, 31 Atl. 119; *Smith v. Tobener*, 32 Mo. App. 601.

The only function of the publication, whether made once, twice, or any number of times, was to give notice. Persons to whom it actually gave notice, and who appeared in response thereto without raising any objection to its sufficiency, should be held estopped to say that it did not perform that function. The situation is analogous to that presented by defective publication of summons in an ordinary action. In such cases, it is uniformly held that parties, by appearing generally without raising any question as to the sufficiency of the publication, waive the right to object. We are constrained to hold that the appellants, having ad-

mittedly appeared at the hearing before the city council in response to the notice, and having failed to show that they then questioned its sufficiency, cannot now raise that question.

A notice of the time of hearing upon the confirmation of the assessment roll was also published. This was required by a general ordinance of the city of Puyallup, but is not required by the general law. The appearance of the appellants to that notice would probably be insufficient to waive defects in the proceeding. Their appearance to the original notice, the publication of which was required by the statute, did, however, constitute a waiver of any defect in the notice.

The judgment is affirmed.

MOUNT, C. J., MORRIS, and FULLERTON, JJ., concur.

[No. 10599. *En Banc.* October 29, 1912.]

GUS A. WINCKLER, *Plaintiff*, v. J. P. STRICKLER *et al.*, *Defendants*.[1]

SPECIFIC PERFORMANCE—RELIEF—DAMAGES—DISCRETION. In an action for specific performance of a contract for the exchange of properties, in which there was a conflict in the evidence as to whether there had been a change of possession, an allowance of damages in lieu of specific performance will be sustained, where plaintiff is thereby fully compensated for his loss; since the relief is a matter resting in the sound discretion of the lower court.

Cross-appeals from a judgment of the superior court for Walla Walla county, Brents, J., entered November 11, 1911, in an action on contract. Affirmed.

John C. Hurspool, for plaintiff.

Edward C. Mills, for defendants.

MAIN, J.—In this opinion the parties will be referred to as plaintiff and defendants, both parties having taken an

[1]Reported in 127 Pac. 206.

appeal from the judgment of the trial court.

Some time prior to the 1st day of April, 1910, the parties to this action entered into negotiations looking to an exchange of properties. The plaintiff was to exchange certain real estate situated in the city of Walla Walla, then owned by one Matt Mosgrove, for a stock of merchandise situated at Hatton, Washington, and owned by the defendants. These negotiations terminated in a written contract between the parties, which provided for an exchange of the properties and was executed on July 1, 1910; the material parts of which are as follows:

"For a deed fully executed and clear abstract thereto by Matt Mosgrove, Milton, Oregon, and delivered to J. P. Strickler and H. W. DeMuth to certain real property located in Walla Walla, being lots 5, 6, 7, 8, and improvements thereto in Park Addition to the City of Walla Walla for the consideration of ($9,000) Nine Thousand Dollars. For the said consideration, J. P. Strickler and H. W. DeMuth agree to deliver free from all incumbrances, all of their entire stock of general merchandise in their store building at Hatton, Washington, consisting of hardware, dry goods, groceries, machinery and machine extras, and fixtures, shelving, counters except the following is to be reserved: 1 safe small one, 2 cash registers, shelving, counters, tables, counter scoops, 1 stool. The value of the above merchandise is to be ascertained from the invoices from such wholesale houses the goods having been bought plus the freight thereto, and any unmerchantable merchandise to be temporarily set aside or any unmarked goods without invoices then to be fairly adjusted to price, cost of invoicing to be paid by Messrs. Strickler & DeMuth. When invoice is completed the net total amount correctly ascertained, whatever amount found deficient to be paid in cash."

Immediately after the signing of this agreement, the parties executed promissory notes to each other in the sum of $1,000 each, as a guarantee that the contract would be performed by the parties thereto respectively, within the period of 30 days thereafter. No further mention need be made of these notes, as they do not become important in the decision

of the case, the plaintiff contending that they became inoperative by reason of a mutual agreement for an extension of time, and the defendants taking the position that they were given by way of penalty and in any event could only furnish a basis for nominal damages.

Soon after these various instruments were executed, the plaintiff went to Hatton, where he, in company with Mr. DeMuth, one of the defendants, proceeded to take an invoice of the stock of goods, and everything proceeded satisfactorily until it came to listing and invoicing the hardware, at which time the plaintiff took the position that the hardware was not intended to be included in the contract. Mr. DeMuth contended otherwise.

While this invoicing was going on, the plaintiff had caused to be prepared and submitted to the attorney for the defendants an abstract of title to the Walla Walla property. After the invoicing was completed, the parties all met again at Walla Walla. The attorney for the defendants thereupon raised certain objections to the title as shown by the abstract. Two questions were now in dispute between the parties: first, was the hardware intended to be included in the contract; and secondly, the objections to the title. Some days were spent by the parties in discussing these questions and in an endeavor to reach an adjustment. No satisfactory adjustment being reached, the defendants denied the plaintiff the possession of the stock of goods; and the plaintiff thereupon brought this action, seeking to reform the written contract so as to eliminate the hardware, and after such reformation, if granted, praying for specific performance, or if reformation was denied, specific performance of the contract as it was written. The defendants answered, denying the plaintiff's right to either reformation or specific performance, and praying for affirmative relief in the form of damages.

The plaintiff contended that the insertion of the word "hardware" in the written contract was done under such circumstances as to constitute a fraud upon him; the defend-

ants contending that the contract, as written, expressed the agreement of the parties. With reference to the second question, that of the objections to the title, the plaintiff contended that an oral stipulation had been entered into by which he was to have one hundred days in which to perfect the title, upon his giving a surety bond in the sum of $9,000. He further contended that he subsequently tendered a deed, together with such bond. The defendants denied this oral stipulation and denied that the deed and bond had been tendered. The case came on for trial, and the evidence on the behalf of the plaintiff and the defendants respectively, on both of the questions submitted, was directly and positively contradictory. The trial court made no findings of fact and conclusions of law, but simply entered judgment. This judgment denied the plaintiff the reformation of the contract, as contended for, and allowed the plaintiff the sum of $500 as damages and compensation for the failure on the part of the defendants to perform the contract, as modified by the mutual agreements and understandings of the parties. The effect of this judgment is to find the weight of testimony to be with the defendants on the question of the alleged fraud, and to be with the plaintiff on the question of the agreement for the extension of time and the tender of the bond and deed. We have read the entire record in this case and are unable to say that the judgment of the trial court on the questions presented is not sustained by the weight of the evidence.

The question now presents itself, whether the plaintiff is entitled to specific performance or damages, and if damages, the amount thereof. The evidence on the part of the plaintiff was to the effect that, immediately after the execution of the written contract, the defendants had assumed possession of the real estate, and that the plaintiff, immediately after the invoice, had taken possession of the stock of goods. The evidence on the part of the defendants denied that they had taken possession of the Walla Walla property and denied

that they had surrendered possession of the stock of goods to the plaintiff. The trial court must have found with the defendants on these questions, otherwise it would doubtless have entered a judgment for specific performance. Although in cases of this character, it is for the sound and legal discretion of the court to determine whether specific performance will be decreed or damages awarded. In *Bower v. Bagley*, 9 Wash. 642, 38 Pac. 164, this principle is stated thus:

"Whether the performance of a contract will be specifically enforced by the court depends upon the circumstances of the particular case. And the granting or refusing of the remedy has been said to be a matter resting in the sound and legal discretion of the court."

The plaintiff for the loss that he has sustained can be adequately compensated in damages, and we believe that the sum of $500 allowed by the trial court, under all of the circumstances of this case, does substantial justice between the parties.

The judgment is affirmed.

ALL CONCUR.

[No. 10394. Department Two. October 30, 1912.]

PIERCE COUNTY, *Appellant*, v. LIZZIE MAGNUSON, *Respondent*.[1]

COSTS—LIABILITY OF COUNTY—JUVENILE COURTS—INFANTS—PROCEEDINGS. There is no power to award costs against a county, upon dismissing proceedings before the juvenile court against a delinquent child and her parent, in the absence of any express statutory authority therefor, whether the proceeding be civil or criminal in its nature.

INFANTS—DELINQUENT CHILDREN—PROCEEDINGS—COSTS—RIGHT TO. Costs cannot be allowed in a proceeding against a delinquent child and her parent contributing to the delinquency, entitled "In re the welfare of R;" as they are not authorized by Rem. & Bal. Code,

[1]Reported in 127 Pac. 302.

§ 491, authorizing costs in all actions prosecuted in the name and for the use of the state or county; nor by virtue of Id., § 2225, authorizing costs in proceedings before a committing magistrate; nor by the statutes giving every person accused of crime the right to the compulsory attendance of witnesses.

Appeal from an order of the superior court for Pierce county, Clifford, J., entered March 29, 1912, in favor of the defendant, awarding costs, as against a county, in proceedings before the juvenile court. Reversed.

J. L. McMurray and *A. O. Burmeister*, for appellant.

Frank H. Kelley, for respondent.

Morris, J.—This appeal presents the liability of counties for costs in proceedings before the juvenile court, and arises out of these facts: A complaint was filed in the juvenile court of Pierce county, charging Marjorie Rieman with being a delinquent child, and respondent, the mother of the child, with contributing to such delinquency. Respondent appeared and demanded a jury trial, which was granted, resulting in a finding that the charges were not sustained, and that respondent was a proper and suitable person to have the custody of the child, and awarding her costs. Respondent filed her cost bill, and on March 23, 1912, the court made an order allowing the fees of her witnesses as against the county, and directing the county auditor to issue warrants in payment of such costs. From this order, the county appealed.

The juvenile court act, chapter 190, Laws of 1909, page 668 (Rem. & Bal. Code, § 1987), makes no provision for the awarding or payment of costs, except the provision authorizing the publication of notice when the person standing in the position of natural or legal guardian of the person of the alleged delinquent child is a nonresident, or the whereabouts of such person is unknown. In cases of such publication of notice, it is provided that the cost of such publication shall be paid by the county. Another section provides for the payment by the county of salaries to probation officers. Other-

wise the act is silent on the question of fees and costs. The awarding and payment of costs is purely a matter of statutory regulation. The recovery of costs was unknown to the common law, and no provision could be made for their payment except as expressly authorized by statute. This rule has been one of such universal application that it has become the settled doctrine of the courts that costs are the creature of statute merely, and that the allowance of them in any case would depend entirely upon the terms of some statute. It has also been held that there is no inherent power in the courts to award costs, and that they can be granted in any case or proceeding solely by virtue of express statutory authority. 5 Ency. Plead. & Prac., 110. In *Coggill v. Lawrence*, 2 Blatchf. (U. S.) 304, it was held that neither party can recover costs upon any equity in the case; nor does the court possess authority to award them as an incident of its power over the parties or the subject-matter of the litigation. In *Commonwealth v. Buccieri*, 153 Pa. St. 570, 26 Atl. 245, the accused, being in extreme poverty, asked the court for an order on the county to pay costs on his appeal. The court, in denying the motion, said:

"To justify such an order, we should be able to point to a statute authorizing it; for if there be no 'thus saith the law,' we are powerless to grant the relief prayed for."

Counsel for respondent contends that the proceeding in the juvenile court is criminal in its nature, and for this reason costs should follow as in other criminal cases. But he cites no statute which, by its terms or necessary implication, would include these items. The doctrine that costs cannot be awarded except as provided by statute applies to criminal as well as civil cases. In this respect the character of the proceeding creates no distinction. In *State v. Blackburn*, 61 Ark. 407, 33 S. W. 529, where it was sought to charge the county with costs in a bastardy proceeding, the court, after laying down the rule that the liability of counties for costs

in criminal prosecutions rests alone on the statute, concludes by saying:

"Our conclusion is that no one is bound for costs, unless rendered so by some positive provision of law, or as a necessary implication from provision of law, and that neither the state nor the county is bound even by legal provisions, unless it is specifically or by necessary implication named or referred to therein."

This rule is supported by the following cases, and seems to be generally accepted as the true rule: *State ex rel. Pollard v. Brewer*, 59 Ala. 134; *Board of Comrs. of Larimer County v. Lee*, 3 Colo. App. 177, 32 Pac. 841; *Peters v. State*, 9 Ga. 109; *Donnelly v. County of Johnson*, 7 Iowa 419; *Moore v. People*, 37 Ill. App. 641; *State v. Campbell*, 19 Kan. 481; *Booth v. McQueen*, 1 Dougl. (Mich.) 41; *State ex rel. Howser v. Oliver*, 116 Mo. 188, 22 S. W. 637; *State v. Walsh*, 44 N. J. L. 470; *People ex rel. New York Society etc. v. Gilmore*, 88 N. Y. 626; *Noyes v. State*, 46 Wis. 250, 1 N. W. 1, 32 Am. Rep. 710. The rule has been followed in our own cases. In *State ex rel. Rochford v. Superior Court*, 4 Wash. 30, 29 Pac. 764, an attempt was made to charge a county with the expense of stenographic notes of the testimony. In denying the claim, the court said:

"A county is a somewhat peculiar institution, against which claims are not enforced unless they are warranted by some plain provision of law."

In *Presby v. Klickitat County*, 5 Wash. 329, 31 Pac. 876, the court, in denying compensation to an attorney appointed to defend one charged with crime, uses this language:

"We cannot yield our assent to the doctrine that an appointment by the courts, and the rendering of services in accordance therewith, raise a legal obligation, which fixes a liability upon the county to pay for the services thus rendered. Neither can we perceive any special force in the suggestion that the county where the trial is had, or of which the accused may be a resident, is liable because it is charged with the expense of the arrest, imprisonment and trial of all

persons accused of crime. Why is the county liable for these expenses? The answer is, simply because the statute so provides."

In *State v. Rutledge*, 40 Wash. 9, 82 Pac. 126, it is said:

"It may be conceded that the state, in the absence of a statute so providing, is never liable for costs in a criminal action, whether the defendant be acquitted or convicted."

Other cases supporting this rule are *Stowe v. State*, 2 Wash. 124, 25 Pac. 1085; *State ex rel. Langhorne v. Superior Court*, 32 Wash. 80, 72 Pac. 1027.

It is immaterial, then, whether proceedings in the juvenile court are or are not of a criminal nature, if, as indicated by the above authorities, costs can only be awarded under express statutory provision. There being no provision in the act creating the juvenile court for the awarding of costs against the county, the authority to do so, if it exists, must be found in some other statutory provision. Section 491, Rem. & Bal. Code, the general provision under which costs are awarded in cases in which the state or county is a party, provides that:

"In all actions prosecuted in the name and for the use of the state, or in the name and for the use of any county, the state or county shall be liable for costs in the same case and to the same extent as private parties."

This section has evidently no application, except in cases where the state or county is a party litigant, to either a civil or criminal proceeding. In the proceedings in the juvenile court, the county is not a party. It neither prosecutes nor defends. It has no interest in the outcome of the proceeding except that general interest which the state has in the welfare of its citizens, which might be sufficient to induce the law-makers of the state to say the public will subject itself to costs; but until there is such an enactment, this statute must be interpreted in the light of its plain intent. Section 508, Rem. & Bal. Code, provides that each county shall be liable to pay the per diem and mileage of jurors and the fees

of sheriffs for maintaining persons charged with crime. This is a special statute and cannot be extended beyond its language. Section 2225 is another special statute, which provides that, when any person shall be brought before a justice of the peace or other committing magistrate charged with the commission of a crime or misdemeanor, and such complaint upon examination shall appear to be unfounded, the costs shall be chargeable to the county, city, or town for or in which the complaint is triable. This section has no application. Its provisions, together with those of §§ 1942 and 1954, containing similar provisions, apply only to cases of examinations before committing magistrates. *Ilwaco v. Miller*, 8 Wash. 449, 36 Pac. 269. The proceedings in the court below were entitled: "In re the welfare of Marjorie Rieman," the county in no wise being suggested as a party.

We have other statutes providing, in effect, that every person accused of crime shall be entitled to the compulsory attendance of witnesses necessary for a proper defense. These statutes are of no assistance to respondent, as she is not in this proceeding charged with the commission of any crime. The language of the complaint, so far as it is directed against her, is to the effect that she "is not a proper person to have the custody of this child." This may be a serious delinquency on the part of a parent, but it is not a crime, and to so charge is not to accuse one of the commission of a crime, so that respondent cannot place her right to costs upon any statutory provision providing for compulsory attendance of witnesses in behalf of those accused of crime.

Finding no provision in the act itself which makes the county liable for these costs, nor any general statute under which such a liability can be sustained, we are of the opinion that the order appealed from is without authority of law, and the judgment is reversed.

Mount, C. J., Fullerton, Ellis, and Main, JJ., concur.

[No. 10698. Department Two. October 30, 1912.]

J. B. KETTENHOFEN *et al.*, *Respondents*, v. GLOBE TRANSFER & STORAGE COMPANY, *Appellant*.[1]

CARRIERS—OF GOODS—WHO ARE—CONTRACT—CONSTRUCTION. The defendant, a forwarder of goods, is a common carrier, and liable as such for loss of goods by fire, and not merely as a warehouseman, where it orally contracted for a through shipment from plaintiff's residence in a car of its own procurement and under its own control at a fixed rate, which was less than the railroad's rate for car load lots and more than the rate on less than car load lots, the custom of the defendant being to assemble goods in a warehouse for its own convenience without storage charges, until car load lots could be forwarded to its own agent, who paid the railroad freight and attended to the receipt and distribution of the goods; and it is immaterial that it did not own any railroad line.

SAME—LOSS OF GOODS BY FIRE—STORAGE BY CARRIER—LIABILITY. A common carrier is liable as such for the loss of goods destroyed by fire in its warehouse, where the goods were delivered for transportation and not for storage, the storage being for its own convenience.

SAME—VALUE OF GOODS—EVIDENCE—SUFFICIENCY. A finding that household goods destroyed by fire in a warehouse were of the value of $700, is sustained by evidence of the plaintiff that they were worth $1,000, that being the cost price paid from one to three years previously, from which the court arbitrarily deducted 30 per cent, where the defendant admitted they were worth $500, and offered no evidence as to the value.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 4, 1912, upon findings in favor of the plaintiffs, after a trial on the merits before the court, in an action for damages. Affirmed.

Totten & Rozema, for appellant.

Kerr & McCord, for respondents.

ELLIS, J.—This is an action to recover the value of certain household goods and wearing apparel destroyed by fire while in the custody of the defendant, Globe Transfer & Storage

[1]Reported in 127 Pac. 295.

Company. The defendant was engaged in the business, among other things, of soliciting goods from different persons having less than a car load lot for shipment from Seattle to other points. Its custom was to receive such lots and hold them at its warehouse until a car load destined to a common point had been assembled. It then arranged with some railroad company for a car to that point, placed the goods in the car, each piece marked for identification as to ownership, billed the car to its agent, and turned the car over to the railroad company for transportation to the given point. The placing of such goods in the warehouse was not for storage, but for the defendant's own convenience in assembling the car load lots as incidental to the carriage of the goods. No storage charge was made. The defendant usually charged a freight rate for such shipments higher than the railroad company's car load rate and lower than its less than car load rate, the defendant's compensation being the difference between its own charge and the car load rate paid by it to the railroad company. The defendant's manager testified that its agent at the point of destination pays the freight and collects the freight plus the defendant's compensation, styled by him "our commission," unless it is paid in advance.

The plaintiffs delivered their goods to the defendant under an oral agreement for shipment from their residence in Seattle to Milwaukee, Wisconsin, the defendant having agreed to notify the plaintiffs as soon as it would be ready to load the car. On Saturday, January 28, 1911, the notification was given, and the defendant, in the afternoon of that day, sent its conveyances, transported the goods from the plaintiffs' residence to its warehouse, where they arrived at about six o'clock in the evening, too late for loading into the car. They were placed in the warehouse for weighing, sorting, listing, and storage, till they could be placed in the car. While in the warehouse the goods were destroyed by fire. There was no evidence that the plaintiffs had any knowledge of the details of the defendant's business or that the goods

would be stored in the warehouse at all. The cause was tried to the court without a jury. The court found the facts substantially as above condensed; also that the plaintiffs were damaged in the sum of $686, and that the reasonable value of the defendant's services in packing and carting the goods was the sum of $27.50. Judgment in favor of the plaintiffs was rendered for the difference of $658.50, and for costs. The defendant has appealed.

The appellant concedes that, if the goods when destroyed were in its possession as a common carrier, it is liable for their loss. It contends, however, that its possession was that of a forwarder or warehouseman, and not that of a common carrier. The duties and liabilities assumed by the appellant, in legal contemplation, must be determined by the nature of the contract of the parties. A thorough examination of the evidence leads to the sure conclusion that the contract was one for a through shipment from the residence of the respondents in the city of Seattle to the city of Milwaukee. The means to that end were left entirely to the appellant's selection and control. The goods were delivered with no other direction expressed or implied. Neither the service on the one hand nor the compensation on the other was segregated, itemized, or separately considered. It was a contract for a through shipment at a rate to be fixed by the appellant. The goods were not delivered for mere forwarding to the railroad company, nor for storage in a warehouse; they were delivered for shipment by whatever route the appellant might find most to its advantage, and in a car of its own procuring. In this branch of its business the appellant was exercising the employment of receiving, carrying, and delivering goods, wares, and merchandise as an occupation, and for all people indifferently. By its contract it assumed the entire control of the goods, severing the respondents' connection therewith until delivery at the place of destination. Such was the ordinary course of its business, and such was the plain purport of the contract. It was a contract for carriage and delivery

for hire, pure and simple; and in so contracting, the appellant assumed the attributes, and took on the relation of, a common carrier for hire, with all of the duties and liabilities incident to that relation. It can make no manner of difference that in other branches of its business it may have been a mere forwarder or warehouseman, or that it so styled itself. Its character, as concerns the business here involved, must be determined by the nature of the service it contracted to perform, without regard to the name by which it has chosen to designate its general business. *Bare v. American Forwarding Co.*, 146 Ill. App. 388; *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith (N. Y.) 115; *Lee v. Fidelity Storage and Transfer Co.*, 51 Wash. 208, 98 Pac. 658; *Garberson v. Trans-Continental Freight Co.*, 51 Wash. 213, 98 Pac. 612.

"The law, regardless of forms or names, will look at the real transaction, and if the contract be in fact one for transportation and delivery of the goods to a consignee, no matter through what agencies it is to be effected, the undertaking will be construed as that of a common carrier." Hutchinson, Carriers (3d ed.), § 83.

The appellant lays much stress upon the fact that it did not own a line of railway nor control the entire means of transportation. This is not material. It is sufficient that, in the ordinary course of its business, it made a contract by which it agreed to transport and deliver the goods. *Cownie Glove Co. v. Merchants' Dispatch Transp. Co.*, 130 Iowa 327, 106 N. W. 749, 114 Am. St. 419, 4 L. R. A. (N. S.) 1060; *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68; Hutchinson, Carriers (3d ed.), §§ 83, 84.

Nor is it material that the goods were destroyed while in the appellant's warehouse. They were delivered for transportation, not for storage. The storage was at the appellant's instance and for its own convenience.

"But where warehousemen, wharfingers, or forwarders of freight combine the two characters, treating the deposit with them as being merely for the convenience of further carriage or to encourage or promote their business as common car-

riers, they will be held to a strict liability as such from the time of the delivery to them. In such cases the deposit is a mere accessory to the carriage, and for the purpose of facilitating it, and the liability as carrier begins with the receipt of the goods." Hutchinson, Carriers (3d ed.), § 71. See, also, *St. Louis, I. M. & S. R. Co. v. Murphy*, 60 Ark. 333, 30 S. W. 419, 46 Am. St. 202; *Wehmann v. Minneapolis, St. P. & S. S. M. R. Co.*, 58 Minn. 22, 59 N. W. 546.

The reasoning of the court in the Illinois case of *Bare v. American Forwarding Co., supra*, seems to us unanswerable. The appellant claims that the later case of *Blair v. American Forwarding Co.*, 159 Ill. App. 511, decided by the same court, counteracts the former decision, but we think not. It does not purport to overrule the former decision, but merely to distinguish the two cases on the facts. In any event, the earlier decision, as it seems to us, is the more logical and convincing. Nor are we impressed by the interstate commerce decisions—*California Commercial Ass'n v. Wells, Fargo & Co.*, 14 I. C. C. 422, and *Export Shipping Co. v. Wabash R. Co.*, 14 I. C. C. 437, cited by the appellant. So far as applicable to the facts here, they seem to us unsound. On both reason and what we conceive to be the more logical authorities, we hold that, under the circumstances here shown, the appellant assumed the duties and liabilities of a common carrier.

The appellant also contends that there was not sufficient evidence of the value of the goods destroyed. The respondents testified that they were of the value of $1,000. No evidence was offered to the contrary. It appeared, however, that this value as to most of the items was the same as the cost price, paid from one to three years previously. The court, therefore, found a value of thirty per cent less than that testified to. The evidence as to value was not satisfactory, and the court's reduction was arbitrary; but in view of the fact that the appellant in its answer admitted that

the goods at the time of their destruction were worth $500, and that it offered no evidence as to value, we would not be warranted in disturbing the court's finding.

The judgment is affirmed.

MOUNT, C. J., MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10099. Department Two. November 1, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. BELLINGHAM BAY BREWERY, *Appellant*.[1]

INTOXICATING LIQUORS—OFFENSES—ILLEGAL SALES—LOCAL OPTION LAW—SALE AND DELIVERY AT BREWERY—STATUTES—CONSTRUCTION. A brewery in a no-license unit is not authorized to make a delivery of a case of bottled beer at its brewery to a person calling there for it, by Rem. & Bal. Code, § 6309, providing that the local option law shall not apply in no-license units to shipments or deliveries of unbroken packages at residences which are not places of business or of public resort, by manufacturers or wholesalers in their own conveyances by common carrier or otherwise, and providing that the act shall not prohibit the manufacture from raw material "nor the delivery of the same."

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered October 23, 1911, upon overruling a demurrer to the information, adjudging the defendant guilty of selling liquor in a dry unit in violation of the local option law. Affirmed.

Chas. A. Sather, for appellant.

Frank W. Bixby and *Howard C. Thompson*, for respondent.

PER CURIAM.—The appellant was informed against for the offense of selling intoxicating liquor in a unit in which such sales were forbidden by law. The facts constituting the offense were stipulated between the parties and are as follows:

[1]Reported in 127 Pac. 297.

"It is stipulated between the state and the defendant in this cause that the following are the facts upon which the information is based in said cause and shall be considered by the court in passing on the demurrer to said information.

"That the defendant Bellingham Bay Brewery is an incorporated company and manufacturing plant engaged in the manufacture of intoxicating liquors from raw materials at Bellingham, Washington.

"That the city of Bellingham is a 'dry' or no-licensed unit within the meaning of Chapter 81 of Session Laws of 1909.

"That on or about the 30th day of June, 1911, two men called at the office of the Bellingham Bay Brewery and purchased of the proper employee in charge of the sales department, a case of bottled beer. This case was an unbroken package containing five gallons and over to wit: Twenty-four quarts, and they paid therefor the regular price of $3.50. That the sale was effected in the usual and customary way of making sales at breweries, that is, by taking a sales slip from the proper clerk at the office and presenting the same at the bottling works (all in one plant), where said men were given the beer in exchange for the slip. The liquor was thereupon taken away from the premises by said men and not opened or used thereon.

"That it is conceded by the state in this case that said brewery has a right to manufacture, sell and deliver its goods to patrons, provided that the delivery is made in conveyance owned or furnished by it to the residence of said patron; it is conceded for sake of argument of demurrer that the defendant has complied with the general license laws with reference to its business.

"That the only and immediate question involved here is whether or not said brewery had a right to deliver its goods upon its own premises to any purchaser or patron who may present himself willing to pay therefor and take the same away.

"That defendant is charged with having violated section 18, chapter 81 of the Session Laws of Washington, 1909, by the information herein."

To the information and stipulation, a demurrer was filed, based on the ground that the facts stated do not constitute a crime. The demurrer was overruled, and upon the election

of the defendant to stand thereon, it was adjudged guilty of the offense charged, and sentenced to pay a fine of $50. This appeal is from the judgment so entered.

Section 18 of the local option act (Laws 1909, p. 165; Rem. & Bal. Code, § 6309), prescribing under what circumstances and by whom intoxicating liquors may be sold and delivered in a no-license unit, reads as follows:

"It shall be unlawful for any person, or public or private carrier, to accept or receive for shipment, transportation or delivery to any person or place within any unit in which the sale of intoxicating liquor is forbidden under the provisions of this act, or to carry, bring into or transfer to any other person, carrier or agent, or handle, deliver or distribute in any such unit any intoxicating liquor of any sort or character whatsoever; and whoever shall, either as principal, agent or servant, knowingly violate any of the provisions of this section shall, upon conviction thereof, be fined not less than fifty dollars nor more than five hundred dollars, and upon a subsequent violation of this section, in addition to the fine hereinbefore prescribed, he shall, if a natural person, be imprisoned in the county jail for not less than thirty days nor more than six months: Provided, however, That nothing herein contained shall be construed to apply to any individual who may bring into such unit upon his person or as his personal baggage and for his private use intoxicating liquor in quantity not to exceed one gallon of spirituous liquor or one case of malt liquor, nor to physicians or druggists to whom any public carrier may deliver such goods in unbroken packages, nor to deliveries to churches or the proper officers thereof of wine in unbroken packages for sacramental purposes, nor in shipments or deliveries at residences which are not places of business or of public resort, by manufacturers or wholesalers in their own conveyances, or by any common carrier or otherwise, any unbroken packages of liquor, nor to shipments of liquor in continuous transit to a point outside of such unit, nor to shipments of commercially pure alcohol for mechanical or chemical purposes. This section shall apply to all packages of intoxicating liquor, whether broken or unbroken, and the carrying into or delivery of each such package of intoxicating liquor, regardless of the name by which it may be called, ac-

cepted, received, carried, transferred, handled, delivered, or distributed in violation of the provisions of this section, shall constitute a separate offense, and any liquor so carried or delivered shall be forfeited and shall be destroyed by the officer seizing the same: Provided, That nothing in this act shall be construed to prohibit the manufacture of intoxicating liquor from the raw material in any no-license unit, nor the delivery of the same."

It will be observed that the only exception made in favor of manufacturers and wholesalers from the general prohibition against the sale and delivery of intoxicating liquors in a no-license unit is the clause in the first proviso of the section quoted, which prescribes that nothing in the act shall apply "to shipments or deliveries at residences which are not places of business or of public resort, by manufacturers or wholesalers in their own conveyances, or by common carrier, or otherwise, any unbroken packages of liquor," and the clause in the last proviso, which prescribes that nothing in the act "shall be construed to prohibit the manufacture of intoxicating liquor from the raw material in any no-license unit, nor the delivery of the same." The first proviso plainly does not include deliveries by the manufacturer at the place of manufacture, and, hence, would preclude a brewery manufacturing beer from delivering the same on its own premises to a consumer residing within the no-license unit; and we think nothing is added to the manufacturer's right in this respect by the concluding clause in the last proviso. The delivery therein contemplated must be the delivery mentioned in the first proviso, otherwise we must convict the legislature of intending a repeal of the clause referring to manufacturers contained in the first proviso by the clause in the second. This we cannot do, and consequently we hold that the trial court correctly resolved in the negative the question stated in the stipulation.

The judgment is affirmed.

[No. 10155. Department Two. November 1, 1912.]

THE STATE OF WASHINGTON, *Appellant*, v. BELLINGHAM BAY BREWERY, *Respondent*.[1]

INTOXICATING LIQUORS—OFFENSES—ILLEGAL SALES—LOCAL OPTION—SALES BY MANUFACTURERS—STATUTES—CONSTRUCTION. The local option law, Rem. & Bal. Code, § 6309, which permits the manufacturers or wholesalers in a no-license unit to make shipments or deliveries in their own conveyances of unbroken packages to patrons at private residences, does not permit the manufacturer to make sales in a no-license unit; in view of the restrictions in the act against all sales in such units (CHADWICK, J., dissenting).

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered December 27, 1911, upon sustaining a demurrer to the information, dismissing a prosecution for selling liquor in a dry unit in violation of the local option law. Reversed.

Frank W. Bixby and *Howard C. Thompson*, for appellant.

Chas. A. Sather, for respondent.

FULLERTON, J.—The respondent was accused, by an information filed in the superior court of Whatcom county, of the offense of selling intoxicating liquors in violation of the act of March 12, 1909, commonly known as the local option law. The information, aided by a written stipulation of facts filed therewith, sets forth that the city of Bellingham is a unit in which the sale of intoxicating liquor is prohibited; that the respondent, the Bellingham Bay Brewery, is a corporation engaged in the manufacture of intoxicating liquors from raw materials, having its manufacturing plant within the corporate limits of the city of Bellingham, which plant was constructed prior to the passage of the local option law; that on December 20, 1911, the respondent sold to one John Doe, for cash at its manufacturing plant, one case of beer

[1]Reported in 127 Pac. 298.

containing 24 bottles, and agreed to, and did immediately thereafter, deliver the same in its own conveyance at the private residence of the purchaser, in the city of Bellingham. It was conceded by the state that the respondent had the right to manufacture intoxicating liquors at its plant and deliver the same to its patrons in good faith within the limits of the city of Bellingham, provided it does so in its own conveyance at the private residences of such patrons. It is also conceded that the respondent has complied with the general license laws with reference to its business. A demurrer was interposed to the information, based on the ground that the same did not state facts sufficient to constitute an offense, which demurrer the trial court sustained and dismissed the proceedings. The state appeals.

The appeal presents but a single question; namely, can a person who manufactures intoxicating liquor from raw material in a unit which has voted against the sale of intoxicating liquor therein sell the same in that unit. The court had occasion to examine the provisions of the local option act in the late case of *State v. Robinson*, 67 Wash. 425, 121 Pac. 848, which involved the question whether a wholesale dealer in intoxicating liquors could make sales of the same in a unit which had voted against the sale of intoxicating liquors therein, the act not forbidding such dealer to deliver in his own conveyances, or through common carriers, any unbroken package of liquor to residences of individuals in such unit which are not places of business or of public resort. In the course of the opinion, we took occasion to point out the several provisions of the act which referred to sales of intoxicating liquor, and sought to show that the legislature had, in all of the several sections of the act, unless the one on which the wholesale dealer relied was an exception, defined in unequivocal language the instances when, and the persons by whom, sales of intoxicating liquors could be made, drawing the conclusion therefrom that the section on which the

dealer relied did not authorize such sale. In the course of the opinion, this language being used:

"The act is pregnant with but one meaning, and that meaning is that intoxicating liquors shall not be sold in dry units except by druggists and pharmacists. Any other view would take the life blood out of the act. The wholesaler within a dry unit must, like his competitor without that unit, make his sales in wet territory. As we have suggested, had it been the intention of the law-making body to permit a unit to prohibit only the sale of intoxicating liquors at retail, that purpose would have been expressly stated in both the title and the body of the act, and it would not have taken twenty-two sections to state it. To hold that the language in the proviso to section 18 implies the right of a wholesaler in a dry unit to both sell and deliver therein would be to read out of the statute words of clear and certain meaning, and to read into it a privilege which the law-making branch of the government deemed it wise to withhold. The provisions in the act that intoxicating liquors shall not be sold in a dry unit 'in any quantity whatever,' that the taking or soliciting of orders or the making of agreements for the sale or delivery therein shall be deemed an unlawful sale, the stringent penalties flowing from a violation of the act, the care taken to safeguard sales by druggists and pharmacists who are privileged to sell—all point to the conclusion that all sales of intoxicating liquors within a dry unit, not expressly permitted by the act, are prohibited."

Section 18 of the act to which we there referred reads as follows:

"It shall be unlawful for any person, or public or private carrier, to accept or receive for shipment, transportation or delivery to any person or place within any unit in which the sale of intoxicating liquor is forbidden under the provisions of this act, or to carry, bring into or transfer to any other person, carrier or agent, or handle, deliver or distribute in any such unit any intoxicating liquor of any sort or character whatsoever; and whoever shall, either as principal, agent or servant, knowingly violate any of the provisions of this section shall, upon conviction thereof, be fined not less than fifty dollars nor more than five hundred dollars, and upon a subsequent violation of this section, in addition to the fine

hereinbefore prescribed, he shall, if a natural person, be imprisoned in the county jail for not less than thirty days nor more than six months: Provided, however, That nothing herein contained shall be construed to apply to any individual who may bring into such unit upon his person or as his personal baggage and for his private use intoxicating liquor in quantity not to exceed one gallon of spirituous liquor or one case of malt liquor, nor to physicians or druggists to whom any public carrier may deliver such goods in unbroken packages, nor to deliveries to churches or the proper officers thereof of wine in unbroken packages for sacramental purposes, nor to shipments or deliveries at residences which are not places of business or of public resort, by manufacturers or wholesalers in their own conveyances, or by any common carrier or otherwise, any unbroken packages of liquor, nor to shipments of liquor in continuous transit to a point outside of such unit, nor to shipments of commercially pure alcohol for mechanical or chemical purposes. This section shall apply to all packages of intoxicating liquor, whether broken or unbroken, and the carrying into or delivery of each such package of intoxicating liquor, regardless of the name by which it may be called, accepted, received, carried, transferred, handled, delivered, or distributed in violation of the provisions of this section, shall constitute a separate offense, and any liquor so carried or delivered shall be forfeited and shall be destroyed by the officer seizing the same: Provided, That nothing in this act shall be construed to prohibit the manufacture of intoxicating liquor from the raw material in any no-license unit, nor the delivery of the same." Laws 1909, p. 165; Rem. & Bal. Code, § 6309.

In the case to which we have just referred, the defendant relied upon the first proviso. It will be observed that, while a wholesale dealer is permitted to deliver at residences which are not places of business or of public resort intoxicating liquor in unbroken packages, nothing is said in the immediate connection concerning the sale of such liquors therein, although sales in no-license units were expressly prohibited by preceding sections, and the argument was that sale and delivery were practically synonymous terms, and that the legislature must have intended to permit sales of intoxicat-

ing liquors to be made in no-license units by the persons who were authorized to make delivery of such liquors therein. It was to refute this contention that the language was used which we have quoted.

In the present case, the defendant relies upon the last proviso quoted. He likewise contends that permission to one in his situation to make deliveries in a no-license unit is permission to make sales therein. But we cannot so conclude. A manufacturer whose plant is in a no-license unit can continue therein to manufacture intoxicating liquors out of raw materials, and he may make deliveries from his plant to "residences which are not places of business, or of public resort," in his own conveyance or by common carrier; but on the authority of the case cited, he cannot make sales of his product in such units. Sales can only be made, if made within the state, in those units where the sale of liquor is licensed.

It follows that the trial court erred in sustaining the demurrer and dismissing the proceedings. Its judgment is therefore reversed, and the cause is remanded with instructions to reinstate the case, overrule the demurrer, and proceed with its further hearing in the manner prescribed by law.

MOUNT, C. J., ELLIS, and MORRIS, JJ., concur.

CHADWICK, J. (dissenting)—I would be glad to concur in the opinion of my associates if it were not for certain rules of statutory construction which in my judgment are violated by the rule of the majority. The first rule of statutory construction is to ascertain, if possible, the legislative intent. Another, of almost equal force, is that a rule which will lead to absurd consequences in the operation of the statute should not be formulated by the court. In this case there is no reason for the speculation indulged in by the majority. The record of the local option bill is before us. When it was introduced in the house, it is certain that there was no exception in favor of the manufacturer in a dry unit. The bill was referred to a committee, and certain amendments

were proposed. The last proviso in section 18 came from the committee in the following form:

"*Provided*, That nothing in this act shall be construed to prohibit any manufacturer of intoxicating liquor from the raw material in any no-license unit from delivering the same *outside* of such unit, when permitted by law." Journal of the House (1909), p. 536.

(The italics are my own.) When the bill came on for consideration, "Mr. Beach moved to amend by striking the words 'any manufacturer,' in line 22 in said section 18, and inserting in lieu thereof the words 'the manufacture', and by striking the word 'from' at the end of line 23, and inserting in lieu thereof the words 'nor the delivery of the same.'" Id. 546.

The committee amendment permitted a delivery when made *outside* of the unit only. The amendment adopted by the house clearly intended that liquor might be manufactured in the dry district and delivered therein. Such was the understanding of the legislative body. The bill had formerly been considered by the senate. The bill was afterwards considered in conference, and later, upon motion of Senator Falconer that the senate "do concur" in the house amendments, Senator Cotterill, whose interest in, and understanding of, the local option law cannot be questioned, said:

"This is probably the closing vote in connection with the local option matter at this session. It seems apparent that the House amendments to Senate substitute bill No. 121 will be concurred in, and that it will become the law for the next two years. If this were the last legislative session to be held in this state for many years, I should be tempted to vote for this amended bill. It is probably the best compromise bill that can be wrung from the political headquarters of the combined liquor interests of this state. I have labored too long and acquired too much experience in the great struggle of the home against the saloon to accept temperance legislation with brewery modifications. Even where saloons may be outlawed under the operation of this bill—and I sincerely hope they may and shall earnestly work to that end—the brewery wagon will still have the unrestricted right-of-way

for its business everywhere throughout our state, and the express companies and other delivery agencies will do an unrestrained business in 'booze'; all by the direct authorization of the amended bill now before us, and regardless of the will of the majority in any locality.

"This bill may still be called a 'local option' bill, but it is so 'local' as to permit the fourth-class town, even down to 300 population, incorporated within one square mile, to be a unit to itself, and inflict its saloons and their consequences upon an unconsenting surrounding community which supports it and of which it is only the small business center. The 'option' in this bill is all on the side of the brewery. Whatever may be the vote of the people in any locality, it stays and does business and sells its product where it pleases

. . . . . .

"I have voted for one local option bill at this session, the Falconer full county-unit bill, with its thorough law-enforcement features. Every effort and energy at my command have been exhausted to secure its enactment. I am content with that record, and refuse any responsibility for the amended bill now forced upon us as this last resort. I desire this protest against it to be entered upon the record, and when the roll is called upon the question of concurrence with the House amendments, I shall vote 'No'." Journal of the Senate (1909), p. 816.

Senator Cox, who also appreciated the force and meaning of the house amendment as well as the intent of the legislature, caused views of like import to be put in the record. Journal of the Senate (1909), p. 817. With this record before us, it seems that the court should not be warranted in indulging in what I conceive to be highly technical reasoning to sustain a construction which, in effect, negatives the vote of a majority, indeed a very great majority, of the senators and representatives voting upon the amendments to and passage of the bill. It occurs to me, as it did to the senators I have quoted, that the common sense of the amendment is that, if a manufacturer can make and deliver in a dry unit, a right to accept compensation for his goods is necessarily implied. The very question before this court

having been discussed and repudiated by the legislature, it would be more in keeping with the duty and province of this and other courts to leave the matter with the legislature for any change or amendment. If it were not for the legislative record, it might be that the reasoning of the court could be sustained, but it cannot be with the light we have before us.

The majority has declared the law as it applies to wholesalers, to manufacturers, and, as I have said, it leads to a ridiculous consequence. The object of the amendment to the proviso is plain; it was to protect the manufacturer in his family trade, and at the same time to leave to the purchaser a privilege which he might indulge without resort to that circumlocution which ordinarily marks the conduct of a malefactor. Under this decision, the manufacturer of liquor from the raw product in a dry unit may manufacture at will, but he cannot make delivery "to churches or the proper officers thereof of wine in unbroken packages for sacramental purposes," nor "shipments or deliveries at residences which are not places of business or of public resort," if the order is given at his place of business. The manufacturer must resort to a shallow subterfuge. As I understand the majority opinion, it amounts to this: The manufacturer can appoint an agent or open an office in a wet unit, and a customer may send his order to that unit and, upon its transmission, the manufacturer can deliver the goods. They say this is a *sale* in a wet unit. It may be so, but it does violence to the purpose and spirit of the law as well as the clear expression of the legislative body. In other words, a customer can call up the manufacturer and order liquor in unbroken packages, and the manufacturer must say to him: "You cannot order it at the factory. You must buy it through our office in Seattle, or wherever it may be established. When you have done this, we will deliver the goods." Such is the law as I understand it to be written by the court.

The judgment of the lower court should be affirmed.

[No. 10843. Department One. November 2, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Walter D. Peters, Plaintiff*, v. THE SUPERIOR COURT FOR KITSAP COUNTY, *Respondent*.[1]

ELECTIONS—NOMINATIONS—ACTIONS TO RESTRAIN AUDITOR—PARTIES PLAINTIFF. Under the express provisions of the primary election law, any citizen of the county may maintain an action to restrain the county auditor from illegally placing upon the general election ballot the names of candidates as nominees of a political party who had not been legally nominated by such party.

ELECTIONS—NOMINATIONS—CONVENTION—DEFINITION—MASS CONVENTION OUTSIDE COUNTY—LEGALITY. Under Rem. & Bal. Code, § 4794, defining a convention as an "organized assemblage of the electors or delegates representing a party or a principle," and Id., § 4830, requiring political parties which cast less than ten per cent at the last preceding election to nominate candidates at a convention, county nominees of the progressive party, which cast no votes at the last election, are not named at a "convention," and are therefore not entitled to have their names placed on the general election ballot, where it appears that in K. county, a party primary election was held in but seven out of the thirty-one voting precincts to elect one delegate in each precinct to a state convention which had been called for September 10th, and one delegate to a county convention, that no notice of a county convention was given, but that, during a recess at the state convention held in another county, the five delegates elected to the county convention, with 25 to 40 others present from K. county, meeting as a convention of assembled electors of K. county, nominated progressive party candidates for county offices, without any pretense of holding a county convention in obedience to the invitation to elect delegates at the party primary, the proceedings showing that a mass convention only was held; since such a popular or mass convention, held outside of the county without notice is not fairly representative, would open the door to fraud, and is contrary to the spirit of the direct primary law designed to give every opportunity to participate in the selection of party nominees.

ELECTIONS—NOMINATIONS—CANDIDATES OF TWO PARTIES—VACANCIES—POWER TO DECLARE OR FILL. Under the primary law requiring a person nominated for an office by two parties to designate the ticket upon which he desires his name to appear, the right to be-

[1]Reported in 127 Pac. 310.

come a candidate of two or more parties is a valuable right, and the central committee of a political party authorized to fill vacancies has no power to declare a vacancy where the lawful nominee of two parties, in declining to be a candidate under both tickets, did not decline the nomination in writing in the manner required by Rem. & Bal. Code, § 4802.

Certiorari to review a judgment of the superior court for Kitsap county, Kauffman, J., entered October 25, 1912, in favor of the plaintiff, upon stipulated facts, in an action to enjoin the placing of names of nominees on the general election ballot. Affirmed.

J. W. Bryan and *Jas. W. Carr*, for relator.

F. W. Moore, for respondent.

CHADWICK, J.—A party primary was held by the adherents of the new Progressive party of this state on September 7. The party, being in the formative period and having cast no votes at the last election, could not participate in the general primary to be held on September 10, but was put to the stress of holding conventions in order to make its nominations legal. A general ballot was prepared and circulated in Kitsap county. The party primary was held in but seven precincts out of the thirty-one voting precincts in the county. The record shows that there are approximately five thousand voters in Kitsap county. The ballot provided a form for the selection of delegates:

Delegate to State Convention. (Write One Name.)

Delegate to County Convention. (Write One Name.)
Who will also be your precinct committeeman for the coming year.

The party primary was abortive. It is conceded that only five delegates were selected, and that no more than seventy votes were cast. No provision or notice was made or given for the place of holding a county convention, although it was published on August 30th that the "Progressives of Kitsap county formed a permanent organization Tuesday

evening [August 27th] and unanimously decided to have a county ticket in the field." At the state convention in Seattle, King county, and during a recess in its proceedings, those present from Kitsap county as delegates (and so far as the record shows the greater part of them were voluntary delegates), and possibly others, to the number of "25 or 40," organized what is now called the regular county convention for Kitsap county. Although it is suggested that the presence of a number or all of the five delegates elected as delegates to a county convention gives a leaven of regularity to the proceeding, the record of the convention, as certified by its officers, would indicate that there was no pretense or intention of holding a convention in obedience to the invitation to elect delegates at the party primary, for that effort had palpably failed to record any appreciable manifestation of the public will. We take it that those in charge intended, and that the law must of necessity regard the assemblage, as it is now practically admitted that it was, a mass convention. We shall quote enough of the minutes of that body to make clear the ideas and plans of those in charge:

"This is to certify that, on the 10th day of September, 1912, a convention of assembled electors of Kitsap county, Washington, held a meeting in which was organized the progressive party of Kitsap county, Washington.

"That at the meeting of said electors, the following order of business was had:

"First, Gustav F. Rust, residing at Colby, Washington, was nominated and elected as chairman of the convention and Howard M. Rice, residing at Rolling Bay, Washington, was nominated and elected secretary of the convention.

"That after the nomination and election of the chairman and secretary of said convention, the convention proceeded to nominate a ticket for county officers for said party. That the following officers were then nominated on the progressive ticket for the following hereinafter named offices, to wit: (Here follows the names of the nominees.) . . . . . .

"On motion, properly made and carried, the county committee were authorized to fill any vacancies which might oc-

cur in the ballot hereinbefore nominated. It was ordered that a meeting of the precinct committeemen elected in the primary on September 7th, be held at the court house at Port Orchard, Kitsap county, Washington, on Saturday, September 21st, and that said committee have power to fill all vacancies and prepare a certificate for the county auditor of the nominations made at this convention and at the said committee meeting.

"The said committee was especially authorized to substitute new names for any persons who may decline to accept the nomination and run on the progressive ticket."

The nominees were selected from the names of those who had theretofore filed as members of the republican party, but who were known or believed to be in sympathy with the progressive movement. The men so selected were being voted on in the regular primaries held under the direct primary law in Kitsap county, on the same day and at the same time that they were selected by the progressives assembled at the state convention in Seattle. With two exceptions, W. A. McLeod, the candidate for county attorney, and John T. Anderson, the nominee for county clerk, all those nominated at the Seattle meeting were selected in the republican primaries. On September 21, the county committee met, eight persons being according to the minutes duly accredited, and these having provided for the selection of committeemen from all the precincts in the county, a committee was appointed to wait upon Mr. McLeod to ascertain his intentions. He having asserted his unwillingness to run as a candidate of another party after having submitted himself as a candidate in the republican party primaries, the name of W. D. Peters was proposed and selected by the committee as a candidate for prosecuting attorney. The records of the committee go no further, although it appears in the statement of fact that the executive committee, or a part of it, thereafter nominated one Leonard Wager for county clerk and Roland Hughes for county auditor. The county auditor being about to put the names of these three nominees on the progressive county

ticket, an action was brought to restrain him and a permanent injunction was granted.

The questions that present themselves are as follows: Can a citizen or a candidate of another party, having no interest in the progressive ticket, maintain an action such as was brought in this case? It is unnecessary to discuss this point. As stated in the case of *State ex rel. Reynolds v. Howell*, *ante* p. 467, 126 Pac. 954, the right to maintain an action is secured to every citizen by the express provisions of the primary law. Indeed, there are cases going so far as to hold that it is a right inherent in citizenship, and it was upon this broad principle that the case of *State ex rel. Harvey v. Mason*, 45 Wash. 234, 88 Pac. 126, was made to rest.

The next question is—and it is probably decisive of the whole case—Was the convention held in Seattle, King county, a county convention for Kitsap county, within the meaning of the primary law, Rem. & Bal. Code, §§ 4794 and 4880? We are quite clear that the so-called convention was not such an assemblage. A convention is there defined as an "organized assemblage of the electors or delegates representing a party or a principle." The law provides that nominations so made by a convention shall be certified and filed with the clerk of the board of county commissioners of the respective counties wherein the officers are to be elected. Rem. & Bal. Code, § 4795. There is nothing in the act to indicate an intention to allow a convention to be held outside of the county. It may be that delegates, regularly elected and fairly representative of the whole county, might for convenience meet outside of their county and there transact their business. That question is not before us; but the public has an interest in popular or mass conventions, and if they could be held outside of the county and without notice and there make nominations for county officers, it would open the door to those frauds and abuses which the primary law was designed to circumvent and destroy. Our attention has been directed to several cases holding that some

notice of the time and place of holding a convention should be given in order to insure its regularity, but we find no positive provision in our statutes calling for such notice; nor do we now hold that a notice would be necessary, for this case does not depend upon a solution of that problem. But the fact remains that a convention under our law must be fairly representative; that is, made up of delegates duly elected; or if a mass convention, it must be held at a time and place where citizens so inclined will have the opportunity to assemble and participate.

"Somewhat recently, in the growth of electoral reform, legislation has come to recognize the existence of political party conventions; and the statutes of many states, including those of Montana, have briefly put in definite form the rule that a convention is an organized assemblage of electors or delegates representing a political party or principle. This definition cannot be separated into wholly independent, divisible parts. The assemblage must not only be an organized one, but the electors as well must, when so organized, represent a political party or principle. Thus a convention must be a representative body. Now, if we are right in this reasoning, this representation is of electors of the party to whom the candidates of the convention are to be submitted for election to office. And this representation must be what the statute implies,—a gathering of electors springing from the electors who compose a political party or adhere to a political principle. If such electors fail or decline to send delegates to the convention, or if the delegates sent disagree or act unwisely, then other matters may arise; but there can be no representation without the presence of electors fairly representing the party, or without some opportunity having been given to the electors to say whether or not they desire their party or principle to be represented. . . . The whole theory of representation, as fairly intended by the law, was entirely ignored. The vigorous authority of the electors of the party was lacking, and, unless relief is granted in such cases, the voters of the state who are members of an existing political party, may be confronted with a ballot containing the names of persons in whose nomination they had no opportunity whatever to take part by delegate rep-

resentation. We cannot assent to such a method as a convention nomination of candidates. A political convention is to a certain extent a law unto itself, and the right to assemble in convention is one that must be always upheld, but whether there has been a convention with authority to nominate candidates is, under conditions of fact, one that must be determined by applying the statute law of the state. The duty of the court, therefore, in this case is to subject the methods employed to form a convention to such examination as any other case properly presented to a court would be. We have done so, and our conclusion is that there was no state convention held, and the writ must issue as prayed for." *State ex rel. Metcalf v. Johnson*, 18 Mont. 548, 46 Pac. 533, 34 L. R. A. 313.

Taking into consideration the place of holding the present assemblage, we are unwilling to hold that the convention was fairly representative. We do not question the sincerity of those participating in the meeting held at Seattle, and it may be that in this case no harm would come of it; but to sustain the act although innocuous, would compel the statement of a rule that would make it possible for evilly disposed or designing persons to assemble in limited numbers in an out-of-the-way place, or out of a county or city, and usurp the name of a party or the cloak of a principle, and thus defeat the will of a great majority of those attached to the party or in sympathy with its principles. It is not so much what was done in this case, as what might be done if we hold the Seattle meeting was a regular county convention.

Furthermore, it is the spirit of the direct primary law that every opportunity be given to participate in the selection of party nominees. That part of it calling for conventions is equally potent to protect the citizen in this right. It is likewise against the policy of the law to allow a new party to organize, or to continue after organization, without affording opportunity to sympathetic citizens to participate in its movements and deliberations. Therefore, if notice in its strict sense be not required, there should be such a showing of facts

as to imply notice or opportunity. The republican convention of 1856, the recent progressive state convention, and the convention parliaments of 1399, 1660 and 1689, were of the latter class; but it could not be held that the three tailors of Tooley Street met in convention, although their declarations were equally vehement. Our law is framed to protect parties from the dangers of secret manipulation and to prevent control by factions; for, although parties may die and principles languish, human nature remains about the same; methods may change, but impulses do not. We find, therefore, nothing in the spirit or letter of the election laws to sustain a voluntary assemblage of a few of the citizens of Kitsap county held in another county of the state.

If the character of a mass convention be attributed to the so-called central committee meeting, which is extremely doubtful (*State ex rel. Russell v. Tooker*, 18 Mont. 540, 46 Pac. 530, 34 L. R. A. 315), its endeavor to nominate under the guise of filling vacancies was unwarranted. It was not held on September 10, the time fixed by law, which is in itself an implied invitation to all interested to be present; and further, although power to fill vacancies be granted to its executive committee, that committee could not *declare* vacancies. This may be illustrated by the case of Gordon. Gordon was a candidate at the regular primaries and received the republican nomination. He was likewise nominated at the Seattle meeting. Now, if it be granted that the Seattle meeting was a regular convention, Gordon was the lawful nominee of the two parties. The only condition put upon him by the law of the state is that he designate the ticket upon which he desires his name to appear. Opinion of the Attorney General, No. 245; *State ex rel, Sheppard v. Superior Court*, 60 Wash. 370, 111 Pac. 233, 140 Am. St. 925. The record shows that, on the afternoon of the last day for filing nominations, two of the executive committee called upon Mr. Gordon and asked him whether he intended to be a candidate on the progressive ticket. He replied that he did not; that

he would run on the republican ticket. Whereupon those making the inquiry offered for filing a nomination of Roland Hughes. Manifestly, the right which the law gives a person to be the nominee of two parties is a valuable right, and it cannot be taken away by any one or in any manner other than as provided in the code. Rem. & Bal. Code, § 4802.

The nominations of the three persons, Wager, Peters and Hughes, are without legal effect, for the reason that no convention within the meaning of the law was ever held. The nomination of Roland Hughes for county auditor is without legal effect for the further reason that, although the Seattle meeting be credited with the dignity of a party convention, neither the central committee nor the executive committee had power under the law to declare a vacancy for the purpose of offering the nomination of another person.

The judgment of the lower court is affirmed.

MOUNT, C. J., GOSE, CROW, and PARKER, JJ., concur.

[No. 10838. Department One. November 2, 1912.]

THE STATE OF WASHINGTON, *on the Relation of A. J. Forgues, Plaintiff*, v. THE SUPERIOR COURT FOR LEWIS COUNTY, *Respondent*.[1]

INTOXICATING LIQUORS—LOCAL OPTION—ELECTIONS—STATUTES—CONSTRUCTION. A city election for the purpose of electing city officers to carry out the change to a commission form of government is a "general election," within the local option law, Rem. & Bal. Code, § 6294, providing that the petition for an election in a local unit shall be signed by qualified electors equal in number to thirty per cent of the electors voting at the "last general election within such unit."

JUDGMENT—BAR—RES JUDICATA—PARTIES CONCLUDED—CASES OF GENERAL INTEREST. A judgment sustaining a demurrer and dismissing an action brought by a citizen and taxpayer against a city clerk to enjoin the holding of a local option election on the ground

[1]Reported in 127 Pac. 313.

that the petition therefor was insufficient, is *res judicata* and a bar to a similar action brought for the same purpose by another citizen and taxpayer alleging his special interest as a retail liquor dealer, where it is not shown that the former suit was fictitious or collusive.

Certiorari to review a judgment of the superior court for Lewis county, Rice, J., entered October 25, 1912, in favor of the defendant, upon stipulated facts, dismissing an action to enjoin the holding of a local option election. Affirmed.

B. H. Rhodes and *William A. Greene*, for plaintiff.

W. N. Beal, for respondent.

Gose, J.—On the 11th day of September, 1912, one Blue, a citizen and taxpayer of the city of Centralia, a municipal corporation, commenced an action in the superior court of Lewis county against L. Mabel Lee, as city clerk of that city. He alleged that a certain petition filed with the defendant, having for its object a submission to the qualified electors of that city on November 5 of the question whether the sale of intoxicating liquors shall be licensed or prohibited therein, was illegal and void for the reasons, that the number of electors voting at the last general election held in said city prior to the filing of the petition was 1,330; that 480 names were signed to the petition; that neither of the signers of the petition stated either the name of the precinct wherein he resided or his post office address. The petition further alleged that the defendant, unless enjoined, would cause such question to be submitted to the qualified electors of the city on November 5. On the 18th day of September, an order was entered sustaining a demurrer to this petition. After the filing of the opinion in *State ex rel. Griffin v. Superior Court*, *ante* p. 545, 127 Pac. 120, the relator commenced a similar action against the same defendant in the same court, alleging in his petition that he was an elector and a taxpayer within the city of Centralia; that he was a retail dealer of intoxicating liquors therein; that he held a license for the

sale of intoxicating liquors issued by the city; and that he also held a retail internal revenue license. He also alleged that the petition attacked in the Blue case was illegal and void for the reason that it was signed by only 471 qualified electors, and that the number of electors voting at the last general election prior to the filing of the petition was 1,759, and that thirty per cent of that number was 528. The record in the Blue case was pleaded as a bar to the relator's case.

The case was called for trial on the 25th day of October; whereupon counsel for the respective parties stipulated, (1) that "the records and files" in the Blue case should be received in evidence; (2) that 1,759 votes were cast at the election held in the city of Centralia on the 28th day of December, 1911, that 440 votes were cast in the 1910 municipal election, that 908 votes were cast at the general county election in 1910, and that the petition was signed by 471 electors; (3) that the election held on the 28th day of December, 1911, was the first and original election held under the commission form of government in the city of Centralia for the election of city officers; and (4): "Mr. Green, this brings the case down to two points, namely, first is the case of Blue v. L. Mabel Lee, clerk of city of Centralia, which was formerly tried in this court, *res judicata* in this case? Secondly, Was the election held on December 28th, 1911, a general election?" The court held that the election held on December 28, 1911, for the election of city officers, was the last general election held in the city of Centralia, and that the judgment in the Blue case was a bar to the relator's action. We think we have fairly stated the record. We have found it somewhat difficult, however, owing to the fact that the record in the Blue case, although admitted in evidence, has not been brought to this court. The relator has sued out an alternative writ of review.

The record presents two questions: (1) Was the election held in the city of Centralia on December 28, 1911, for the purpose of electing city officers to carry out the change to

a commission form of government, a general election within the meaning of the local option law, Laws 1909, page 153, § 3 (Rem. & Bal. Code, § 6294)? And (2), if so, is the judgment in the Blue case a bar to the relator's action?

We think the first question must receive an affirmative answer. In the recent case of *State ex rel. Griffin v. Superior Court, supra*, we had occasion to consider the words "the last general election within such unit," found in the local option act. After considering the purpose and history of the law, we there said:

"To that end we believe that the words 'last general election' were used advisedly and mean any general election at which there has been a general and popular expression of the public will, whether that election be a state, county or city election. Whether the statute would include other elections of a quasi general character, we are not now called upon to decide."

We are satisfied with the conclusion reached in that case, and the reasoning need not be repeated. The rule there announced is decisive upon this question. The election was held in pursuance of the Laws of 1911, page 522, § 3. It was within the unit of the city of Centralia. It was held to elect city officers, and was a general election, and the last general election "within such unit."

There remains to be considered the question of the effect of the judgment in the Blue case. The stability of judgments is the basis of the doctrine of *res judicata*. The term means that a question once decided is, as between parties to the action and those in privity with them, in the absence of fraud, collusion, or review, finally decided. In 23 Cyc. 1269, the following rule is announced respecting the conclusiveness of a judgment in a suit between a taxpayer and a municipality or an officer representing it:

"A judgment for or against a municipal corporation, in a suit concerning a matter which is of general interest to all the citizens or taxpayers thereof, as the levy and collection

of taxes, or public contracts or other obligations, or public property, its title, character or boundaries, is binding, not only on the municipality and its officers, but also upon such citizens or taxpayers, in so far as concerns their rights or interests as members of the general public, although not in respect to rights which they hold as individuals, peculiar to themselves and not shared with the public. And subject to similar limitations, a judgment between certain residents or taxpayers and the municipality may be conclusive on all other citizens similarly situated, and where an action between individuals concerns public interests or rights, and the municipality is represented in the litigation by its proper officers and takes part in the prosecution or defense of the action, it is estopped by the result."

The same rule is announced in *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. 25.

But it is argued that the relator as the holder of a retail liquor license and an internal revenue license has rights peculiar to himself and not shared by the public, and hence that the Blue judgment is not conclusive upon him. There is, however, an identity of subject-matter in the two suits. They both present the single question of the sufficiency of the petition. The first case was presented and decided upon the assumption that the election of 1910 was to be taken as the basis for determining the sufficiency of the petition. The charge there was that the signatures were illegal because the signers failed to give their post office address or name of their precinct. It is true that the relator as the holder of a retail liquor license has certain rights and privileges not possessed by the general taxpayer, and that the license is in a sense property. The question, however, is, Could he have maintained an action upon the bare allegation of these facts? He did not rely on them alone, but alleged further that he was a taxpayer. We think the answer must be found in the purpose of the petition and the suit. The petitioners are only seeking to have the question whether the sale of intoxicating liquors shall be licensed or prohibited submitted to the qualified electors of the city of Centralia. This involves only the

police policy of the city. A taxpayer may and has litigated the sufficiency of the petition. As to the taxpayer, the judgment in the Blue case is conclusive. The interest of one taxpayer may be many times greater than the interest of some other taxpayer, measured in dollars, but the law regards the difference as one of degree only.

We have read the authorities cited by the relator, but they do not aid in the solution of the question. He has cited *Rahr v. Wittmann*, 147 Wis. 195, 132 N. W. 1107, 36 L. R. A. (N. S.) 392. The facts in that case were that the mayor of a city in his official capacity had prosecuted an action against the same defendant to compel her to remove an obstruction in a certain street, alleging that it was a public street. It was held that the street was not a public street. In a second action, prosecuted by the same plaintiff in his private capacity against the same defendant, it was held that the former judgment was not a bar to the claim that the defendant was estopped as against the plaintiff to deny that it was a street. We do not think the rights of the relator differ so in kind from the rights of the general taxpayer that he can escape the effect of the former judgment.

The relator argues that the former suit was fictitious, and collusive, and for this reason it is not a bar to his action. It suffices to say that the question is presented in neither the pleadings nor the stipulation.

The judgment is affirmed.

Mount, C. J., Crow, and Parker, JJ., concur.

[No. 10672. Department One. November 2, 1912.]

LLOYD JONES, *Respondent*, v. T. P. FRANCIS *et al.*, *Appellants*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—METHODS OF WORK. An employee in a shingle mill is not guilty of contributory negligence, as a matter of law, where he was engaged in drawing a heavy shingle block to the bolter saw, with his back to the saw, when the picaroon slipped or drew out of the block through some unknown cause, causing him to fall against the saw, which was unguarded.

SAME—SAFE PLACE—GUARDING MACHINERY UNDER FACTORY ACT—NOTICE OF ACCIDENT—SUFFICIENCY—CORPORATIONS—DISSOLUTION. An employee's notice of an accident by reason of the unguarded condition of a saw, required by the factory act, Rem. & Bal. Code, § 6595, to be given the employer, is sufficient if given to a corporation that had been dissolved by the secretary of state for nonpayment of its license fees, where it was at the time believed by all parties that the corporation had an existence and its mill was being operated in its name by its trustees who received the notice.

CORPORATIONS—DISSOLUTION—ABSORPTION BY NEW CORPORATION—LIABILITY. Where an old corporation had been dissolved by the secretary of state for nonpayment of its license fees, without notice to its trustees, who, when they learned of the fact, organized a new corporation and conveyed to it all the assets without other consideration than the issue of its capital stock to the old stockholders, thereby absorbing the old company, the new corporation is liable upon all the obligations of the old corporation.

ABATEMENT AND REVIVAL—AGAINST CORPORATION—DISSOLUTION. The dissolution of a corporation by the secretary of state for nonpayment of its license fees will not abate an action for personal injuries brought against it by an employee, where the assets were all transferred to the trustees and by them to a new corporation which assumed all the obligations and was an absorption or continuation of the old corporation.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered February 5, 1912, upon findings in favor of the plaintiff, in an action for personal injuries

[1]Reported in 126 Pac. 307.

sustained by an employee in a shingle mill, after a trial on the merits to the court. Affirmed.

John P. Hartman, C. D. Cunningham, Forney & Ponder, and *Dysart & Ellsbury,* for appellants.

Gus L. Thacker and *Hayden & Langhorne,* for respondent.

Gose, J.—This is an action to recover damages for personal injuries sustained by an employee. The case was tried to the court, and a judgment for $5,000 was entered against all the defendants. This appeal followed.

The court found, and the evidence shows, that between July 17, 1900, and February 23, 1910, the Chehalis River Lumber Company, hereafter called the old corporation, was a Washington corporation organized for the purpose of manufacturing timber products and engaged in the operation of a shingle mill; that, on the date last stated, it had assets exceeding $100,000 in value; that the appellants Francis and the Davies were the trustees and only stockholders; that Francis was its president and manager; that, for some years prior to the date last stated, it had failed to pay its annual license fee to the state; that on that date the secretary of state dissolved it and caused its name to be stricken from his records; that it had no actual notice thereof; that thereafter and until January 28, 1911, it continued to exercise its corporate powers and privileges, employed many persons to labor in its mill, and paid them with its check drawn by its manager in its corporate name; that, on and prior to July 26, 1910, the respondent was employed in its mill and that he had no notice of its dissolution; that on the date last stated he was injured while in the performance of his work as a deck hand, in an unguarded bolter saw which could have been reasonably and practicably safeguarded; that, on September 26, he caused a written notice of the time, place, and cause of the accident to be served upon the appellant Francis,

who was then acting as its president and manager and had active charge of its business in the operation of its mill. The court further found that, in January, 1911, the appellants Francis and the Davies became aware of the dissolution of the corporation by the secretary of state; that they then, in an *ex parte* proceeding, procured an order to be entered in the superior court of Lewis county, directing them as trustees of the corporation to transfer to themselves all the property and assets of the corporation, and that they made the conveyance as directed by the order; that they then as individuals organized the appellant corporation, the Chehalis River Lumber and Shingle Company, hereafter called the new corporation, and conveyed such assets and property to it, without consideration except that it issued to them as individuals its shares of its capital stock in the ratio of their former respective interests in the old corporation, and that the new corporation did not acquire any other assets or property; that the objects of both corporations are identical; that the latter was only a continuation of the former, and that it assumed all its debts and liabilities and all the debts and liabilities that had accrued during the period of its dissolution. There was a further finding that the respondent had no notice of the dissolution of the old corporation until January 30, 1911, and more than six months after he sustained his injuries.

The first question urged by the appellants is that the respondent was guilty of contributory negligence. The respondent was engaged in drawing a heavy, water-soaked shingle block from the drag saw to the bolter saw, with his back to the latter, when the picaroon which he was using for that purpose slipped or drew out of the block, causing him to fall against the bolter saw, with the result that his right hand was cut off above the wrist. He testified that he did not know what caused it to draw out of the block. These facts do not show contributory negligence. The purpose of the factory act is to require safeguards to be provided in

factories, mills, and workshops where machinery is used with which the employees are liable to come in contact, where it is practicable to do so with due regard to the ordinary use of such machinery, to the end that the dangers incident to the employment may be eliminated so far as a compliance with the terms of the statute may accomplish that object. In short, its object is to protect the workman from the dangers incident to his employment which are not the result of some negligent act on his part.

Timely notice in writing of the time, place, and cause of the injury was given to the old corporation by serving it upon the appellant Francis, its president, manager, and trustee. The notice states that the injury was sustained by reason of its failure to guard the bolter saw. The notice stated further that the injury was suffered while in its employ, at a mill operated by it near Centralia. The appellant contends that this was not notice to the "employer," as required by the factory act, Laws 1905, page 169, § 9 (Rem. & Bal. Code, § 6595). This contention is made upon the theory that, when the secretary of state has entered upon his records a notation that a corporation is dissolved, it ceases to have a corporate existence, and that, under the provisions of Rem. & Bal. Code, § 3715d, "The trustees of such corporation shall hold the title to the property of the corporation for the benefit of its stockholders and creditors, to be disposed of under appropriate court proceedings," and that the trustees *ipso facto* became the employer. If the dissolution be conceded, although it may well be doubted under the view taken in *State ex rel. Preston Mill Co. v. Howell*, 67 Wash. 377, 121 Pac. 861, the deduction is not sound. When the notice was given, it was believed by all the parties that the old corporation had an existence and its mill was being operated by its trustees through Francis, its manager, in the usual way. While the notice is addressed to the old corporation and recites that the respondent was its employee, it was served upon the president, manager and trustee, and it im-

parted all the information to him which the statute requires. As was said in *Falldin v. Seattle*, 50 Wash. 561, 97 Pac. 658, the object of the notice is "notice." It was held in that case that the notice will be liberally, that is, fairly and reasonably, construed, and that if "a person of common understanding can tell from the notice what it meant, that is sufficient." *Berger v. Metropolitan Press Printing Co.*, 55 Wash. 422, 104 Pac. 617, is to the same effect. In *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938, it was held that a notice must be construed with all the liberality of a pleading. In discussing the liberal rule of construction applicable to a notice of this kind, it was said in *Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431:

"This court has uniformly placed a liberal construction upon the requirements of such notice, holding that the notice had a common-sense object, viz., to apprise the officers of the municipality of the location, so that it might be examined with a view to preparing a defense to the action if it was thought a defense should be made; that if it directs the attention of said officers with reasonable certainty to the place of the accident, the requirements of the notice have been met; and that it was not intended that the terms of the notice should be used as a stumbling block or pitfall to prevent recovery by meritorious claimants."

The only purpose in the mind of the lawmakers, in requiring notice of an injury to be given under the factory act, was that the employer might be advised of the time, place, and cause of the injury within the time described in the statute, in order that he might have an opportunity to investigate the merits of the claim. In the light of this purpose, under a fair and reasonable interpretation of the statute, it would seem absurd to hold that the notice was insufficient.

There remains to be considered the contention that there is no liability upon the part of the new corporation. The argument is that the trustees of the old corporation were the respondent's employers at the time he sustained his injury, that there was no liability upon the part of the old corpora-

tion, and hence there can be no liability against the new one. The argument is technical. The new corporation took over the assets of the old one, without any consideration other than to issue its capital stock to the stockholders of the latter in the ratio of their former holdings. The objects, assets and the stockholders of the two corporations are identical. It was not a sale, but an absorption of the assets of the old corporation. These assets exceeded $100,000. The law would indeed be impotent if it could afford the respondent no remedy against the new corporation. Nor will it require him to prosecute two suits when one will suffice. In either event, in the end the result would be the same; that is, the new corporation would have to respond to the liability. It is in reality, as the court found, a mere continuation of the old corporation; that is, it is the same entity under a different name. We are in hearty accord with the rule announced under such circumstances in Clark and Marshall on Private Corporations, page 1000, as follows:

"It seems to have been held that the general rule [that all actions abate on dissolution] does not apply where the circumstances attending the creation of a new corporation, and its succession to the property, franchises, and business of another corporation, are such as to show that the new corporation is in reality, however, it may be in law, a mere continuation of the old corporation; or, in other words, that although technically, as a matter of law, a new corporation may be created, yet, if the old corporation ceases to exist, and all its assets and franchises are acquired by the new, which is in reality a mere continuation of the old, the new corporation is to be held to have impliedly assumed, and is liable upon, all the obligations of the old."

The same general principle was applied in the following cases: *Chase v. Michigan Tel. Co.*, 121 Mich. 631, 80 N. W. 717; *Grenell v. Detroit Gas Co.*, 112 Mich. 70, 70 N. W. 413; 10 Cyc. 306; Clark and Marshall, Private Corporations, p. 1000; *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412, 68 N. W. 628, 59 Am. St. 543, 35 L. R. A. 44; *Friedenwald*

Co. v. Asheville Tobacco Works & Cigarette Co., 112 N. C. 544, 23 S. E. 490; *Berry v. Kansas City, Ft. S. & M. R. Co.*, 52 Kan. 774, 36 Pac. 724, 39 Am. St. 381; *Langhorne v. Richmond R. Co.*, 91 Va. 369, 22 S. E. 159; *Cleveland C. C. & St. L. R. Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367; *Chicago, R. I. & Pac. R. Co. v. Moffitt*, 75 Ill. 524; *State, Use of Dodson v. Baltimore & L. R. Co.*, 77 Md. 489, 26 Atl. 865.

The judgment is affirmed.

MOUNT, C. J., CROW, PARKER, and CHADWICK, JJ., concur.

[No. 10419. Department One. November 2, 1912.]

THE STATE OF WASHINGTON, *on the Relation of C. W. Hodgdon, Appellant*, v. HOQUIAM WATER COMPANY, *Respondent*.[1]

WATERS AND WATER COURSES—WATER COMPANIES—FRANCHISE—SERVICE TO CONSUMERS—COST OF CONNECTIONS. Under a franchise ordinance authorizing a water company to lay its pipes in streets and requiring it to furnish water to consumers at a certain fixed monthly rate, the company must deliver the water to the consumer at his property line, and must therefore defray the expense of extending the line from the main to the property line.

SAME. A provision in a franchise ordinance authorizing a water company to make special rules and regulations for the "use of water" does not empower the company to exact a charge for tapping the main and extending the service line to the lot line.

SAME—REGULATION OF WATER COMPANIES—JURISDICTION OF COURTS. The courts have jurisdiction to determine the right of a water company under its franchise to exact a charge for tapping the main and extending the service pipe to the lot line, notwithstanding the public service commission may have exclusive original jurisdiction to determine questions involving the reasonableness of rates.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 23, 1911, upon find-

[1]Reported in 127 Pac. 304.

ings in favor of the defendant, in an action to compel a water company to furnish water to a customer. Reversed.

Sidney Moor Heath and *C. W. Hodgdon*, for appellant.

Morgan & Brewer and *Bridges & Bruener*, for respondent.

PER CURIAM.—This is an appeal from a judgment of the superior court for Chehalis county, denying the application of the relator for a writ of mandate requiring the Hoquiam Water Company to supply him with water for a house owned by him, situated in the city of Hoquiam, upon a lot bordering upon a public alley in which that company has a main as a part of its system of water works. The water company refused upon demand to furnish appellant water for his house, until he paid to it a charge of four dollars for tapping the main and extending a service pipe from the main to the boundary line of the lot upon which his house is situated. Appellant insists that the water company is required under its franchise to furnish him water at his lot line opposite its main, free from any charge for tapping the main and extending the service pipe to that point, while the water company insists that it has the right to exact a reasonable charge therefor. The water company is maintaining and operating its water works under a franchise granted to its predecessors by the city of Hoquiam, reading in part as follows:

"They are hereby granted a franchise to build and operate a system of water works, and the license of laying water mains and pipes in any and all of the avenues, streets and alleys, waterways, public grounds and thoroughfares in the town of Hoquiam, county of Chehalis and state of Washington, for the purpose of distributing and conveying water throughout said town and for the purpose of selling the same, under such limitations and restrictions as are hereinafter set forth; and he and they shall sell the same to all persons, bodies and corporations desiring to purchase the same; Subject to the provisions, limitations and restrictions hereinafter contained."

The sole question in this case is as to the right of appellant to be furnished water at his lot line, by the water com-

pany, without paying the charge which it seeks to exact from him. The nature of its franchise is indicated by the above quotation therefrom; and, while it is of considerable length and contains other conditions, we deem it sufficient to say that, so far as the duty of the water company to furnish water to the inhabitants of the city thereunder is concerned, such duty is in substance the same as is required of the water works company in the franchise considered by us in the recent case of *Cleveland v. Malden Water Works Co.*, 69 Wash. 541, 125 Pac. 769, in which case we held that the company was required to furnish water at the lot line without exacting any charge for constructing the service pipe from the main to the lot line. We are unable to see any difference in principle between the question here presented and the one decided in that case. We are satisfied with the conclusion reached in that case.

Some contention is made upon a provision of the franchise ordinance permitting the water company to make "special rules and regulations for the use of water." We are of the opinion, however, that this language does not authorize the water company to exact a charge of the nature here sought to be made, since it relates only to the use of the water. The franchise ordinance itself enumerates the charges which may be made by the water company, and there is not included therein any of this nature.

Counsel for respondent contends that the question here involved is within the exclusive original jurisdiction of the public service commission, and that therefore the superior court was without jurisdiction to determine this question in an action brought originally in that court. If the question involved only the reasonableness of the amount of the charge which the water company is here seeking to make, this contention might be regarded as sound; but since there is only involved the question of the right to make any such charge regardless of its amount, we think the superior court has jurisdiction.

We are of the opinion that appellant is entitled to the relief prayed for. The judgment is reversed, with directions to the trial court to proceed in accordance with this opinion.

[No. 10655. Department One. November 2, 1912.]

H. NASSER, *Respondent*, v. GEORGE GASTON, *as Sheriff of Thurston County, Appellant*.[1]

REPLEVIN—STATUTORY CLAIM AND DELIVERY—RIGHTS OF THIRD PERSONS—SHERIFFS—LIABILITY—TROVER AND CONVERSION. Under the claim and delivery statute, which makes ample provision for the indemnity of both parties to the action and the sheriff, but makes no provision for the security of a third party claiming ownership, and provides that where a third party makes claim by affidavit and serving a notice of his title on the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff unless indemnified, a third party may maintain an action of conversion against a sheriff in possession in a claim and delivery suit, where the sheriff refused to surrender the property upon demand and notice by affidavit as provided by the statute.

DEPOSITIONS—STIPULATION—TAKEN UPON INTERROGATORIES—ADMISSIBILITY—PRESENCE AND ACTS OF COUNSEL—EFFECT. Under a stipulation to take a deposition upon interrogatories and cross-interrogatories, on a commission, a party has no right to be represented by attorney when the deposition is taken; and if he is, the deposition will be suppressed.

DEPOSITIONS—STIPULATION FOR TAKING—CONSTRUCTION AND EFFECT. A stipulation for the taking of a deposition reserving the right to object "to any and all questions and answers," does not exclude the right to object to the manner in which it was taken and returned.

SAME. A stipulation for the taking of a deposition is not to be construed in connection with letters written by opposite counsel, when the letters were not acted on, and the stipulation shows the agreement of the parties.

DEPOSITIONS—CERTIFICATE AND RETURN—NECESSITY—SUFFICIENCY. A deposition taken on stipulation is properly suppressed where there is no certificate to it, and it was not returned to the clerk of the

[1]Reported in 127 Pac. 470.

court conformably to Rem. & Bal. Code, § 1242, 1243, which was not substantially complied with, it not being shown by whom it was reduced to writing or that it was read to the witness.

DEPOSITIONS—MOTION TO SUPPRESS—TIME FOR APPLICATION. A motion to suppress a deposition need not be made before the trial, when it was not then filed, and the motion was made as soon as it was published and the grounds ascertainable.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered May 2, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for conversion. Affirmed.

E. N. Steele and *Troy & Sturdevant*, for appellant.

Fletcher & Evans, for respondent.

PER CURIAM.—This is an action for damages for the conversion of personal property. There was a verdict and judgment for the plaintiff. The defendant has appealed.

The facts in brief are these: The appellant, Gaston, as sheriff of Thurston county, in a claim and delivery suit between third parties, took possession of certain personal property which the respondent claimed to own. The appellant took the property into his possession on the 9th day of August, 1911. On the day following, the respondent in writing notified him that he owned the property, and demanded its return. On the next day he served upon him his written affidavit, setting forth his title to the property and his right to possession thereof, and again demanded its return. On the next day he notified him in writing that he elected to treat the taking and detention of the property as a conversion. On the same day the plaintiff in the claim and delivery action gave the appellant an indemnifying bond.

The first and principal question is this: Is the suit maintainable against an officer seizing and holding property under the claim and delivery statute in an action in which the claimant had not been made a party when his action was commenced? The appellant strenuously contends that the action

is not maintainable, and has cited authorities which hold that, at common law, replevin did not lie against an officer who was holding property under a writ of replevin. The ground for the rule was that the property was in the custody of the law, and that the possession of the officer could not be disturbed. This was the common law rule. But the question must be determined by reference to the statute. In *Scott v. McGraw*, 3 Wash. 675, 29 Pac. 260, in a claim and delivery suit against a sheriff who was holding the property under a writ of execution against a third party, the court said that the common law action of replevin had been abrogated and the statutory action of claim and delivery substituted in its place; that the statute, 2 Hill's Code, § 256, provided that, when a delivery is claimed, an affidavit shall be made by the plaintiff, or some one in his behalf, showing, among other things, that the property "has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is by law exempt from such seizure." The court said further: "This language plainly implies that in all cases where the property has not been seized under an execution or attachment against the property of the plaintiff himself, he may recover its possession from an officer who may have seized it. Any other construction would render that portion of the affidavit meaningless." Rem. & Bal. Code, § 708, is identical with 2 Hill's Code, § 256. Whilst the court was considering a case where the sheriff had justified under a writ of execution, the construction announced is clearly right in all cases where the plaintiff is not a party to the suit in which the property was seized. The action is a statutory one, and the provisions of the statute may be invoked by complying with its requirements.

An examination of the claim and delivery statute as a whole, Rem. & Bal. Code, §§ 707-716, inclusive, makes it clear that the action is maintainable. Section 709 provides that, upon receipt of the affidavit in conformity with the pro-

visions of § 708 and a bond to the defendant, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. Section 711 provides that, at any time before the delivery of the property to the plaintiff, the defendant may, if he has not excepted to the sureties on the plaintiff's bond as provided in § 710, require the return of the property, upon giving to the sheriff a bond conditioned for a delivery of the property to the plaintiff if such delivery be adjudged, and for payment to the plaintiff of such sum as may be recovered against the defendant. Section 716 provides:

"If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or his right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff before the delivery of the property to the plaintiff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim by a bond, executed by two sufficient sureties, . . . and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity."

It will be observed that the rights of both the plaintiff and the defendant in the claim and delivery suit are sedulously guarded by the statute, and that ample provision is made, not only for their indemnity, but for the indemnity of the sheriff as well, and that the statute makes no provision for security for a third party claiming ownership. It is significant also that the section last quoted provides that the claim of a third person can only be made by an affidavit stating the grounds of the claimant's title or right to possession. If, as the appellant asserts, intervention in the original action is the only remedy of a third party who claims the property,

why does the statute provide that the sheriff, upon being served with the affidavit, shall not be bound to keep the property or deliver it to the plaintiff, unless the latter upon demand shall give him an indemnifying bond "against such claim"? It is apparent, we think, that the statute contemplates that the party serving the affidavit may, if he wishes, bring any appropriate action against the officer if his demand for a return of the property is not complied with. This construction is supported by *David v. Gambert*, 57 Iowa 239. In *Welter v. Jacobson*, 7 N. D. 32, 73 N. W. 65, 66 Am. St. 632, it was held that trover will lie in such cases. In *McDowell v. McCormick*, 90 Fed. 393, the court held that an action of trespass lies against an officer by a third party who was in possession of the property at the time it was taken in the replevin action. The case of *Mack v. Doak*, 50 Wash. 119, 96 Pac. 825, cited by the appellant, has no application to the case. There the owners of certain personal property had given a chattel mortgage upon it which had been foreclosed under the notice and sales statute, and the property had been sold to the mortgagee. It was held that the sheriff and his bondsmen were not liable in a suit for conversion.

The parties, by their counsel, stipulated that the depositions of two witnesses might be taken "on interrogatories submitted by the defendant and by cross-interrogatories submitted by plaintiff, . . . reserving, however, to both plaintiff and defendant the right to object to any and all questions and answers thereto, either of defendant or plaintiff, by reason of competency, relevancy, materiality, or admissibility thereof, at the time said depositions are used at the trial of said cause, and that the court may issue commissions accordingly." In pursuance of the stipulation, a roving commission was issued to take the deposition of one of the witnesses, and "diligently to examine said witness on the interrogatories, direct and cross, annexed to this commission, on his oath first taken before you, and causing said examination of the said witness to be taken by questions and an-

swers, and to be reduced to writing and signed by the same witness and by yourself, and then certify and return the same annexed to this commission in a sealed envelope into our superior court aforesaid, directed to the clerk thereof, by mail or other usual channel of conveyance . . . under your seal." Interrogatories, direct and cross, were prepared and attached to the commission. One of the appellant's counsel, without notice to respondent, then took the commission and the interrogatories, went to Prince Rupert in British Columbia, was present at the taking of the deposition, returned with it inclosed in a sealed envelope, and filed it with the clerk of the court on the day the trial commenced. The appellant caused the deposition to be published on the first day of the trial. At that time counsel for the respondent moved to suppress it, but the court ruled that the deposition should be published subject to any and all objections when offered in evidence. When the appellant sought to read the deposition in evidence, the respondent again moved to suppress it, on the grounds, among others, (1) because of the said several acts of the appellant's counsel, and (2) because it was neither certified nor mailed to the clerk of the court and was in effect only an affidavit. The motion was sustained upon the second ground.

We think the ground first stated was a fatal one. The stipulation to take the deposition upon the interrogatories and cross-interrogatories, upon a commission, clearly implied that it was to be taken by the commissioner without the presence of either party or his counsel. Any other view would open the door to the grossest fraud. It is not contended that the appellant's counsel was guilty of any wrongful act, other than that he was present at the taking of the deposition and had been in intimate association with the witness for some hours before. He had no right to be present when the deposition was taken; for, as was said in *Beverly v. Burke*, 14 Ga. 70; "There must be no circumstances of unfair advantage obtained by one party over the other, in having testimony

taken by depositions." See, also, *Walker v. Barron*, 4 Minn. 253; *Thomas v. Kinsey*, 8 Ga. 421; *Sayles v. Stewart*, 5 Wis. 8; *Hollister v. Hollister*, 6 Pa. St. 449; *Rice v. Ward*, 93 Tex. 532, 56 S. W. 747; *White v. Southern R. Co.*, 123 Ga. 353, 51 S. E. 411.

The appellant argues, however, that the reservation of the right to object "to any and all questions and answers," upon certain enumerated grounds, excludes all others. This view is untenable. The stipulation, as we have said, clearly implied that the deposition should be regularly taken and returned. This was not done.

Nor can the deposition be made admissible on the ground of necessity. Counsel seeks to excuse his conduct by the fact that he was not able to procure the taking and return of the deposition by mail before the trial commenced. This ground could have been obviated by an earlier application for a commission.

A further contention is made that the stipulation should be read in connection with certain letters written by the respondent's counsel before the stipulation was entered into. The vice of this contention is two-fold; (1) the letter was not acted upon by the appellant, and (2) the stipulation shows the agreement of the parties.

The second ground of the motion is also sound. There is no certificate to the deposition, and it was not returned to the clerk of the court conformably to the commission and the statute, Rem. & Bal. Code, §§ 1242, 1243. It is signed by the witness, and the jurat of the notary is attached. It is argued that the caption of the deposition and the jurat should be read together. It was so held in *Hobart v. Jones*, 5 Wash. 385, 31 Pac. 879. In that case, however, there was a certificate to the deposition, which the court held sufficient when read with the caption. In this case there is no certificate. The deposition does not show by whom it was reduced to writing. It does not show that the deposition was read to the witness, but only that the answers were read to him, and

it was not returned to the clerk of the court. There was no pretense of complying with the statute. The statute provides that, when the deposition is completed, it shall be carefully read to or by the witness, corrected if desired, and subscribed by him. The witness swears that the answers were read to him. An examination of the interrogatories discloses that, in answer to several lengthy questions, he answered "Yes" and "No." It is apparent that a reading of the answers in such cases did not indicate the testimony.

Some of the authorities are to the effect that there must be a substantial compliance with the statute in taking and returning the deposition. 13 Cyc. 955; *Ballard v. Perry's Adm'r*, 28 Tex. 347. Others hold that, in the execution of the commission, the statute must be strictly complied with. *Bell v. Morrison*, 1 Pet. 351; *People v. Morine*, 54 Cal. 575; *Atchison T. & S. F. R. Co. v. Pearson*, 6 Kan. App. 825, 49 Pac. 681; *New Kentucky Coal Co. v. Union Pac. R. Co.*, 52 Neb. 127, 71 N. W. 948. We think the former rule is the better one, but it affords no comfort to appellant.

Finally, it is argued that the motion to suppress the deposition should have been made before the commencement of the trial. The deposition had not then been filed. The respondent took the earliest opportunity to move to suppress it after the grounds were ascertainable. This was sufficient. 13 Cyc. 973.

The view we have taken makes the other assignments immaterial. The judgment is affirmed.

[No. 10551. Department Two. November 4, 1912.]

MUTUAL ADJUSTMENT COMPANY, *Appellant*, v. CHARLES A. OUELLETTE, *Respondent*.[1]

CORPORATIONS — OFFICERS — SALARIES — RESOLUTION — CONSTRUCTION. A resolution fixing the salaries of two officers of a corporation at $50 and $30 per week, "it being understood that the said salaries would be paid out of the net proceeds of the business," makes the salaries conditional, and the only fund out of which they can be paid is the net proceeds during the time the offices were held.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 6, 1912, in favor of the defendant, after a trial on the merits, in an action on contract. Reversed.

Lewis, Lohmann & Levine, for appellant.

James T. Lawler, for respondent.

MORRIS, J.—On May 10, 1911, the Ouellette-Sheehan Company, a corporation engaged in the commission business at Seattle, through its trustees, adopted a resolution fixing the salaries of respondent as president, secretary and treasurer of the company, and Thos. M. Sheehan as sales manager. This resolution reads as follows:

"Thereupon by unanimous vote, the salary of C. A. Ouellette, acting in three different capacities, was fixed at $50 per week, and the salary of Thomas M. Sheehan at $30 per week, it being understood that the said salaries would be paid out of the net proceeds of the business."

The question presented on this appeal is the amount respondent was entitled to draw as salary under the above resolution. It seems to us too plain for argument that there is but one possible interpretation to be placed upon the language of this resolution, and that is that the salaries were not to be paid in any event, but only out of the net proceeds

[1]Reported in 127 Pac. 301.

of the business. To hold otherwise is to rob the resolution of its own understanding of its meaning and purpose, as it has defined such understanding in specifying the "net proceeds" as the only fund out of which salaries could be paid. It is conceded that the net proceeds of the business during the time respondent was connected with it were $1,413.16. Under this resolution it is plain respondent would be entitled to five-eights of such sum and Sheehan the remaining three-eighths. This division would fix the amount respondent was entitled to draw at $883.22. Respondent seems to have believed himself entitled to draw $50 per week in any event, irrespective of proceeds or profits; and, acting under this belief, drew $1,160.12, which is $276.90 more than he was entitled to draw. The corporation assigned its claim for this overpayment to appellant, and suit was brought for its recovery. The court below upon the hearing dismissed the action, and this appeal was taken from such dismissal.

No findings were made by the court, so that we are unable to understand the reasons for the ruling, unless it is the court was of the opinion, as alleged by respondent in his answer, that the Ouellette-Sheehan Company agreed to pay respondent a salary of $50 per week. We find no evidence of any change in the resolution as first adopted, respondent contenting himself with contending that Sheehan, Crowley and himself, the stockholders, believed the salaries to have been unconditionally fixed at $50 and $30 per week. The resolution not being susceptible of such a construction, we cannot follow it, and the judgment is reversed.

Mount, C. J., Main, Ellis, and Fullerton, JJ., concur.

[No. 10479. Department Two. November 4, 1912.]

SARAH A. GUST, *Appellant*, v. ADOLPH A. GUST, *Respondent*.[1]

PLEADING — TRIAL—AMENDMENT—DISCRETION — ABUSE. A trial amendment to the complaint is within the discretion of the court, and will not be disturbed except for abuse of discretion, and none appears, where omissions in the complaint were not called to the attention of the trial court until after the close of plaintiff's evidence, which fully covered the defects.

APPEAL—BRIEFS. A brief on appeal will not be struck out for improperly characterizing the rulings of the trial court, where it was more a thoughtless levity of speech than an abusive utterance.

APPEAL—NOTICE—TIME FOR TAKING—JUDGMENT—ENTRY. Where, upon motion to dismiss at the conclusion of plaintiff's evidence, the court took the matter under advisement, filed with the clerk a written memorandum of its ruling ordering the action dismissed, and subsequently signed and entered a formal decree dismissing the action, the first order is in no sense the final judgment, and the time for taking an appeal begins to run from the entry of the formal decree.

DIVORCE—ADULTERY—EVIDENCE—SUFFICIENCY. In the absence of any denial, evidence of an adulterous disposition, coupled with opportunities to commit the act, and circumstances showing guilt, are sufficient to sustain a charge of adultery in an action for divorce.

Cross-appeals from a judgment of the superior court for King county, Myers, J., entered May 6, 1912, dismissing an action for divorce at defendant's cost, after a trial on the merits. Reversed.

Edward Judd and *B. E. McGregor*, for appellant.

George W. Saulsberry (*H. E. Foster* and *L. Y. Devries*, of counsel), for respondent.

MORRIS, J.—Action for divorce, and appeal from judgment dismissing the action. Respondent also appeals from that portion of the judgment awarding appellant attorney's fees and costs, and permitting amendments to the complaint,

[1]Reported in 127 Pac. 292.

and moves to dismiss the appeal of appellant, and to strike the opening brief and a statement of facts certified to in connection with an application by appellant for suit money, which was denied and which is incorporated in the appeal. These contentions will first be noticed. The conclusion we have reached makes it unnecessary to notice respondent's appeal upon the award of attorney's fees and costs, since the judgment will be reversed upon the merits, leaving this question to the judgment of the court upon the entry of any final decree, upon the further hearing of the case.

We find no error in the allowance of the amendments to the complaint. Such an order will never be disturbed here unless there is a clear abuse of the discretion which, under our statute, is vested in the trial court in such matters. In view of the fact that the omissions in the complaint were not called to the court's attention until after the close of the evidence introduced by appellant, and that such defects were fully covered by the testimony, we think the trial court was justified in permitting the amendments.

The motion to strike the brief is based upon language characterizing the ruling of the trial judge in what appellant considers must have been his view of the law in dismissing the complaint, in view of the evidence before him. This language is not such a dignified reference to the ruling complained of as becomes an attorney in referring to the action of the trial court. It is, however, more a thoughtless levity of speech than an abusive utterance, and not of such a character as demands such a penalty as respondent urges. It is sufficient to say such language weakens, rather than adds to, any brief in which it is incorporated. Motion to strike the brief is denied.

It will not be necessary to refer further to the motion to strike the statement of facts prepared by appellant upon the refusal of the court below to award suit money as prayed for; since the cause is to be sent back and the lower court will have ample opportunity to make such awards for suit money,

attorney's fees and alimony *pendente lite* as, from the showing made before it, may seem just and proper. For this reason we shall not discuss this question as raised by appellant's appeal from the order denying her suit money; the court below having ample power to correct any order it may have previously made, upon becoming satisfied that its award is insufficient to enable appellant to properly prepare and submit her case. The motion to dismiss the appeal can best be discussed in connection with the merits.

The appellant prayed for a divorce upon the ground of adultery. At the conclusion of appellant's evidence, respondent moved to dismiss the action, upon the ground that the complaint failed to allege appellant's residence within King county at the time the action was commenced, and failed to allege that the adultery complained of was unforgiven; and upon the further ground that the evidence failed to establish any adultery. Thereupon appellant asked leave to amend the complaint as to the first two grounds, and the court, after hearing counsel for both parties, took the matter under advisement until the 29th day of March, when a written memorandum of its ruling was filed with the clerk, in which appellant was permitted to amend as to the first two grounds, which are the amendments referred to upon respondent's cross-appeal. As to these grounds, the motion to dismiss was denied. Upon the third ground the court found with respondent, and ordered the action dismissed. Subsequently, and on May 6th, the court signed and entered a formal decree dismissing the action, from which decree the appeal is taken. It is in this connection that respondent moves to dismiss the appeal, contending that the entry of the "memorandum decision" on March 29th was the final decree; and as no appeal has been taken therefrom, this appeal should be dismissed. It is apparent we think, that the entry of March 29 was in no sense a judgment, nor intended as such. It was nothing more than the decision or ruling of the court upon the matters taken under advisement. The court states

the points reserved for its ruling, speaks of the character of evidence demanded by the law in cases of this character, decides the submitted questions, gives his reasons for such decision, cites authorities and concludes "it follows the action must be dismissed, and it is so ordered." These matters are such as are ordinarily mentioned by courts in filing opinions upon questions of law submitted for decision. They are not matters referred to in judgments or decrees, and have no place in such entries. We therefore conclude that the appeal is taken from the final decree in the case, and the motion to dismiss is denied.

There remains to discuss only the ruling of the court as to the insufficiency of the evidence to establish adultery. We apprehend the law is well settled that, in proving charges of this character, when there is no eyewitness to the adulterous acts complained of, evidence of an adulterous disposition, coupled with opportunities to commit the act, and circumstances showing guilt, will be sufficient to sustain the charge, when as here there is no denial. We do not care to recite the evidence, nor, in view of the conclusion we have reached as to a second trial, to comment upon its weight, or character, other than to say, if the evidence offered on behalf of appellant is accepted as true, there can be no doubt of the commission of the acts complained of. We, therefore, are of the opinion that the court erred in holding the evidence insufficient.

The judgment is reversed, and as the ruling of the trial court was in effect a nonsuit, the case is remanded for further proceedings.

Mount, C. J., Fullerton, Ellis, and Main, JJ., concur.

[No. 10368. Department One. September 12, 1912.]

ALBERT PING, *Respondent*, v. J. F. HILL, *Appellant*.[1]

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered January 9, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Allen & Allen, for appellant.

McCarthy & Edge and *H. H. Cleland*, for respondent.

PER CURIAM.—In so far as the questions involved in this case merit discussion they are the same in substance as the questions presented in *Waldrip v. Hill*, *ante* p. 187, 126 Pac. 409. For the reasons there assigned, the judgment in this case is affirmed.

[No. 10802. Department One. October 18, 1912.]

H. G. KELLEY, *Appellant*, v. G. Y. SAKAI *et al.*, *Respondents*.[2]

Motion to dismiss an appeal from a judgment of the superior court for King county, Dykeman, J., entered May 25, 1912. Denied.

R. B. Brown and *Thomas R. Horner*, for appellant.

Hamlin & Meier, for respondents.

PER CURIAM.—The motion to dismiss the appeal on account of the alleged insufficiency of the bond is denied; it appearing to the court that the bond is sufficient as an appeal bond, and as a supersedeas to stay the costs in the judgment appealed from, which said judgment was entered in the superior court of the state of Washington for King county on the 25th day of May, 1912. Further than this, the bond is without legal effect.

[1]Reported in 126 Pac. 411.

[2]Reported in 127 Pac. 107.

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Fraud as to creditors, see FRAUDULENT CONVEYANCES.

ASSOCIATIONS:

See BENEFICIAL ASSOCIATIONS; BUILDING AND LOAN ASSOCIATIONS.

ASSUMPTION:

Of defense by insurance company, see INSURANCE.
Of risk by employee, see MASTER AND SERVANT, 5-7.

ATTACHMENT:

Liability of sheriff for wrongful levy, see SHERIFFS AND CONSTABLES.

ATTORNEY AND CLIENT:

Presence of attorney at time of taking deposition, see DEPOSITIONS, 1.
Attorney's fees on foreclosure of mortgage, see MORTGAGES, 4, 5.
Fees on foreclosure of liens for cost of filling state tide lands, see PUBLIC LANDS, 7.

1. ATTORNEY AND CLIENT—AUTHORITY—COMPROMISE OF SUIT. Where an action to quiet title was compromised by an agreement recognizing the plaintiffs' title, and defendants authorized their attorney

ATTORNEY AND CLIENT—CONTINUED.

to carry out the contract, the attorney had authority to consent to a decree confirming the plaintiffs' title on their performance of the contract. *Cogswell v. Cogswell*..... 178

2. ATTORNEY AND CLIENT—CONTRACT OF EMPLOYMENT — MEETING OF MINDS—RECOVERY ON QUANTUM MERUIT. Where duplicate copies of a contract employing an attorney do not correspond as to the amount of compensation, one containing an interlineation, which was not specially called to the attention of the signers, and it is admitted that both copies were signed by the parties, in the absence of evidence of any meeting of the minds upon the disputed clause, there can be no recovery on the contract upon the point in issue, and the attorney performing the service is entitled to recover only upon *quantum meruit*. *Thayer v. Harbican*..... 278

AUTHORITY:

Of attorney, see ATTORNEY AND CLIENT, 1.
Of corporate officers or agents, see CORPORATIONS, 7.
Of central committee of political party to declare vacancy on ticket, see ELECTIONS, 4.
Of county auditor to bring action to secure count of ballots cast, see ELECTIONS, 5.
Of port district to acquire terminal properties and issue bonds, see MUNICIPAL CORPORATIONS, 35.
Of court to appoint receiver without notice, see RECEIVERS, 1.

AUTOMOBILES:

Collision with bicycle on highway, see HIGHWAYS.
Collision with pedestrian in city street, see MUNICIPAL CORPORATIONS, 29.

AWARD:

See ARBITRATION AND AWARD.

BAILMENT:

See CARRIERS, 1, 2.

BALLOTS:

See ELECTIONS, 5, 6, 8, 9.
For port district election, see MUNICIPAL CORPORATIONS, 5.

BANKS AND BANKING:

Taxation of banks and bank stock, see TAXATION.

BAR:

Of action by former adjudication, see JUDGMENT, 4, 5.
Of action by limitation, see LIMITATION OF ACTIONS.

BENEFICIAL ASSOCIATIONS:

1. BENEFICIAL ASSOCIATIONS — FORFEITURE OF MEMBERSHIP — REINSTATEMENT—ESTOPPEL—ACCEPTANCE OF DUES. A foreign beneficial association is estopped to assert that a member was not reinstated and had forfeited his rights, where, after a default, he regularly applied for reinstatement, was informed by the local lodge that he was reinstated, and subsequently paid all dues, which were forwarded to and retained by the society, credited on the local lodge's general account, leaving the member as standing suspended without notice to him; since the local lodge was the representative of the society. *Richardson v. Brotherhood of Locomotive Firemen and Enginemen*..... 76

BENEFITS:

Retention of as precluding right to rescind compromise of suit, see COMPROMISE AND SETTLEMENT, 2.

BEQUESTS:

See WILLS.

BEST AND SECONDARY EVIDENCE:

In civil actions, see EVIDENCE, 2.

BIDS:

Of purchaser at receiver's sale, see JUDICIAL SALES, 4.

BILLS AND NOTES:

Check in payment as accord and satisfaction, see ACCORD AND SATISFACTION.

Admission as to payment of note, see PLEADING, 3.

1. BILLS AND NOTES—CONSIDERATION—EXTENSION OF TIME. An extension of time for the first payment to become due on a contract for the purchase of land, is a sufficient consideration for a promissory note for the amount of the payment. *Thomas & Co. v. Hillis*..... 53

2. BILLS AND NOTES — VALIDITY — EFFECT — CONSTRUCTION — RATE OF INTEREST — PAYMENT. A mortgage note promising to pay $2,025.60 in 120 equal monthly installments of $16.88 each, on account of the principal sum of a loan of $1,200 and $825.60 interest thereon, the same being total interest for 120 months "calculated upon unpaid monthly balances," is, in the absence of fraud, a valid note as against a maker capable of understanding its terms and making a correct computation; and such note calls for interest at the rate of 11.52 per cent per annum, and each monthly payment decreased the principal until, after 48 payments, the decreased principal amounted to $874.84. *Equitable Sav. & Loan Ass'n v. Bowes*..... 169

3. BILLS AND NOTES—HOLDER IN DUE COURSE—EVIDENCE—QUESTION FOR JURY. Upon an issue as to whether a bank was the holder in due course of a note procured by fraud, the jury is not obliged to accept

BILLS AND NOTES—CONTINUED.

as conclusive the uncontradicted evidence of an officer of the bank that they took the note without notice of any defect or dishonor; the credibility of the witness being for the jury. *National Bank of Commerce v. Drewry*..... 577

BOARDS:

Election board, irregularities or improper conduct of, see ELECTIONS, 6.

BONA FIDE PURCHASER:

Of bill of exchange or promissory note, see BILLS AND NOTES, 3.
Description in deed sufficient to put upon inquiry, see EVIDENCE, 7.

BONDS:

See REPLEVIN.
Supersedeas on appeal, see APPEAL AND ERROR, 8, 9.
Conclusiveness of matters in action against plaintiff and surety in action on injunction bond given in former action, see JUDGMENT, 4.
Municipal bonds, see MUNICIPAL CORPORATIONS, 34-36.
Pleading in action on injunction bond, see PLEADING, 3.
Right to demand indemnity bond, see SHERIFFS AND CONSTABLES.

1. BONDS—INJUNCTION BOND—LIABILITY OF PRINCIPAL. Recovery on an injunction bond obligating the plaintiffs and surety to pay all costs and damages that may accrue to the defendants by reason of continuing the injunction in force cannot be objected to as subjecting the surety to a greater liability than that of the principal, since the statute makes the assumption of the liability by the principal a condition precedent to the continuance of the injunction. *Mead v. Kalberg*. 517

2. BONDS—INJUNCTION BONDS—PLEADING—ACTION—COMPLAINT. In an action upon an injunction bond, the proceedings leading up to the injunction and judgment in the former action are relevant and may be pleaded in the complaint. *Mead v. Kalberg*..... 517

3. BONDS—INJUNCTION BONDS—DAMAGES—LOSS OF PROFITS—REMOTE OR SPECULATIVE DAMAGES—ACTIONS—INSTRUCTIONS. Where a temporary injunction was issued restraining the defendants from performing a city contract assigned to them by the plaintiffs, and an injunction bond was given by plaintiffs on appeal to keep the injunction in force, which bond obligated the plaintiffs to pay all costs and damages that may accrue to the defendants by reason of continuing the temporary injunction in force during the pendency of the appeal, it must be held that the parties contemplated any loss of profits and any damages to defendants that might accrue by reason of subcontracts, then in existence and known to the parties by which defendants had sublet the work, such profits not being too remote or speculative; hence, in a subsequent action on the injunction bond, the jury is properly instructed that it may take the subcontracts into consideration as tending to prove damages by loss of profits that could have been made on the contract. *Mead v. Kalberg*..... 517

BOOKS OF ACCOUNT:

Admissibility in evidence, see EVIDENCE, 3.

BOUNDARIES:

1. BOUNDARIES — LOST CORNERS — ESTABLISHMENT. An obliterated corner must be restored at its original location if ascertained by competent evidence. *Hale v. Ball* 435

2. BOUNDARIES—LOCATION OF CORNER—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows that a quarter corner was not located on a straight line between the section corners, where a witness testified that he found and identified the original stake out of a true line, which was corroborated by the fact that a line fence was constructed to it by defendant, and the inclosure was farmed for twelve years by others, without objection by defendant or any effort on his part to correct the alleged mistake, although the land was being bought and sold. *Hale v. Ball* 435

3. SAME — RIGHT TO COMMISSION — EVIDENCE OF LOCATION — SUFFICIENCY. The court will not appoint a commission to establish a lost corner, under Rem. & Bal. Code, §§ 947-999, merely because the stake was obliterated; and where the corner was not lost or uncertain eighteen years before, at which time a fence was built to it, and nothing had since been done to question the location, the court cannot say that the corner is lost; since evidence of its location was not overcome by better evidence. *Hale v. Ball* 435

BREACH:

Of contract, see CONTRACTS, 4, 6.
Damages for breach of contract, see DAMAGES, 1, 3.
Of covenants in lease, see LANDLORD AND TENANT, 3, 4.
Of stipulations in mortgage, see MORTGAGES, 1, 2.
Of contract of sale, see SALES.
Of warranty, see SALES, 1-3.

BRIEFS:

On appeal, see APPEAL AND ERROR, 11-13.

BROKERS:

1. BROKERS—CONTRACT FOR COMMISSION—PERFORMANCE — EVIDENCE — SUFFICIENCY. A broker failed to earn his commissions by securing a purchaser ready to buy on the terms authorized, which required a payment of $4,000 in cash, and the balance of $8,000 in three years, where it appears that there was an existing mortgage for $4,000, the vendor refused to take a second mortgage for the balance, or merely give a contract, and the purchaser was only willing to pay $4,000 in cash, assume the existing mortgage and give a second mortgage for the balance; and the fact that the parties tried to negotiate for additional security is immaterial if not acted upon. *Elmendorf v. Steel* 88

BROKERS—CONTINUED.

2. BROKERS—COMMISSIONS—PERFORMANCE OF CONTRACT—EVIDENCE—SUFFICIENCY. The fact that a broker first introduced a prospective purchaser, after which he did not purchase, knowing that it was also listed with another broker, does not establish that he earned the agreed upon commissions, where it appears that for several days previously the purchaser had been looking for property with the other broker, who subsequently showed the property, made the sale, and received the commissions; since the latter's efforts were the efficient cause of the sale. *Dore v. Jones*..... 157

BUILDING AND LOAN ASSOCIATIONS:

1. BUILDING AND LOAN ASSOCIATIONS—FRANCHISE—FORFEITURE—ILLEGAL BUSINESS—EVIDENCE — SUFFICIENCY. A suit is warranted by the attorney general to dissolve a corporation which was doing a building and loan association business without complying with the laws relative to such corporations, and without investing any capital of its own, where it had so extravagantly and wastefully managed its affairs that it had cost the investors $100,000 to invest $50,000 of their own money. *State ex rel. Tanner v. Northwestern Investment Co*..... 381

2. SAME — ILLEGAL BUSINESS — DEFENSES — ESTOPPEL — CONSENT OF STATE OFFICIALS. Engaging in the business of a building and loan association without complying with the laws governing such corporations is against public policy, and the fact that the state auditor gave his consent thereto on the advice of the attorney general does not estop the state from proceeding against the corporation to prevent a continuance of the business. *State ex rel. Tanner v. Northwestern Investment Co*..... 381

3. SAME—FORFEITURE OF FRANCHISE—ILLEGAL BUSINESS—RIGHTS OF INVESTORS TO ASSETS. Where a corporation illegally engaging in a building and loan association business has accumulated a fund that belongs to the investors, and sought to transfer its assets to a legally incorporated company, the investors are entitled to have the fund distributed without further reduction than the necessary cost of administering it; and the newly organized building and loan association should be dissolved, where it appeared to be organized for the sole purpose of taking over and administering the fund. *State ex rel. Tanner v. Northwestern Investment Co*..... 381

4. BUILDING AND LOAN ASSOCIATIONS—FRANCHISE—FORFEITURE—ACTIONS—PREREQUISITES—NOTICE — ORAL PROOF — COMPETENCY. Where the state auditor orally notified the attorney general that he deemed it unsafe or inexpedient for a building and loan association to continue to transact business, which by Rem. & Bal. Code, § 3620, is a prerequisite to suit by the attorney general, such notice may be proved by any competent witness who was present and heard the communication. *State ex rel. Tanner v. Northwestern Investment Co*..... 381

BUILDING CONTRACTS:

See CONTRACTS, 1.

BUILDINGS:

Duty to account for proceeds of, see ACCOUNT.

BURDEN OF PROOF:

To show death or divorce, before contesting will, see DESCENT AND DISTRIBUTION.
To show good faith of transaction, see FRAUDULENT CONVEYANCES.
To prove justification for crime or reduce degree, see HOMICIDE, 2.
To show undue influence in execution of will, see WILLS, 3.

CANCELLATION OF INSTRUMENTS:

Rescission of contract for compromise of suit, see COMPROMISE AND SETTLEMENT.
Rescission of contract, see SALES, 3.

CANDIDATES:

For office, see ELECTIONS, 1-5, 7-11.
Eligibility of judge as candidate for other office, see JUDGES, 1

CANVASS:

Of votes at primary election, see ELECTIONS, 5.
Of returns of port district election, see MUNICIPAL CORPORATIONS, 6.

CARRIERS:

1. CARRIERS—OF GOODS—WHO ARE—CONTRACT—CONSTRUCTION. The defendant, a forwarder of goods, is a common carrier, and liable as such for loss of goods by fire, and not merely as a warehouseman, where it orally contracted for a through shipment from plaintiff's residence in a car of its own procurement and under its own control at a fixed rate, which was less than the railroad's rate for car load lots and more than the rate on less than car load lots, the custom of the defendant being to assemble goods in a warehouse for its own convenience without storage charges, until car load lots could be forwarded to its own agent, who paid the railroad freight and attended to the receipt and distribution of the goods; and it is immaterial that it did not own any railroad line. *Kettenhofen v. Globe Transfer & Storage Co*..... 645

2. SAME—LOSS OF GOODS BY FIRE—STORAGE BY CARRIER—LIABILITY. A common carrier is liable as such for the loss of goods destroyed by fire in its warehouse, where the goods were delivered for transportation and not for storage, the storage being for its own convenience. *Kettenhofen v. Globe Transfer & Storage Co*..... 645

3. SAME—VALUE OF GOODS—EVIDENCE—SUFFICIENCY. A finding that household goods destroyed by fire in a warehouse were of the value of $700, is sustained by evidence of the plaintiff that they were worth $1,000, that being the cost price paid from one to three years

CARRIERS—CONTINUED.

previously, from which the court arbitrarily deducted 30 per cent, where the defendant admitted they were worth $500, and offered no evidence as to the value. *Kettenhofen v. Globe Transfer & Storage Co.* 645

4. SAME—DEGREE OF CARE—SLEEPING CARS. The duty of a railroad company to exercise the highest degree of care for passengers compatible with practical operation, applies to sleeping cars connected with the train, regardless of any private contract or arrangement it may have with the sleeping car company. *Valentine v. Northern Pac. R. Co.* 95

5. SAME—CARS AND APPLIANCES—NEGLIGENCE—EVIDENCE. A spring sufficiently strong to close a toilet room door on a Pullman sleeper being a necessary safeguard, in view of the swaying and lurching of the train, evidence that the spring was stronger than found on other cars, is not sufficient to establish negligence or make a case for the jury. *Valentine v. Northern Pac. R. Co.* 95

6. SAME—NEGLIGENCE—OPERATION—SUDDEN LURCH—EVIDENCE — SUFFICIENCY. The lurching of a passenger train does not show negligence, where there was no evidence that the lurch was so violent as not to be accounted for except upon the theory of a defective roadbed or improper management; the doctrine of *res ipsa loquitur* not applying. *Valentine v. Northern Pac. R. Co.* 95

7. CARRIERS—INJURIES TO PASSENGERS—SLEEPING CARS — EVIDENCE — NONSUIT. In an action by a passenger against a railroad company and a sleeping car company for injuries sustained on a sleeping car through the negligent construction of a door and want of lights on the car, a nonsuit as to the sleeping car company is proper, where it was not alleged or shown that it sold the ticket or owned or operated the car. *Valentine v. Northern Pac. R. Co.* 95

8. SAME—NEGLIGENCE—RES IPSA LOQUITUR. The doctrine of *res ipsa loquitur* does not apply to the case of an injury to a passenger by reason of the automatic closing of a spring door, when it was not shown that the door did not close when it ought not to have closed or that the spring did not perform its functions. *Valentine v. Northern Pac. R. Co.* 95

9. SAME—NEGLIGENCE—LIGHTING CAR—QUESTION FOR JURY. In an action by a passenger for injuries sustained when her hand was caught by the closing of a spring door to the toilet room in a sleeping car, whether it was reasonably necessary to light the passageway or toilet room is a question for the jury, where it was a reasonable inference from the testimony that the accident would not have happened if lights had been provided. *Valentine v. Northern Pac. R. Co.* 95

CARRIERS—CONTINUED.

10. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In such case, the contributory negligence of the plaintiff in failing to call for lights is for the jury, where she testified that as soon as she discovered that the toilet room was in darkness she started back to call for light and was injured. *Valentine v. Northern Pac. R. Co.*..... 95

CERTAINTY:

Of pleading, see PLEADING, 1.
Of water contract, see WATERS AND WATER COURSES, 9.

CERTIFICATE:

To deposition, see DEPOSITIONS, 4.
Of engineer on completion of work, see MUNICIPAL CORPORATIONS, 23.
Of partnership containing names of persons conducting business, see PARTNERSHIP.
Of land commissioner upon completion of filling state tide lands, see PUBLIC LANDS, 5, 6.

CHANGE OF VENUE:

Of civil actions, see VENUE.

CHARGE:

To jury in civil actions, see TRIAL, 4.

CHARTER:

Of municipal corporation, see MUNICIPAL CORPORATIONS, 7-12.

CHECKS:

Given in full as accord and satisfaction, see ACCORD AND SATISFACTION.
As evidence, see EVIDENCE, 2.

CHILD:

Delinquent children, see INFANTS.

CITIES:

See MUNICIPAL CORPORATIONS.

CIVIL RIGHTS:

See ELECTIONS, 1.

CLAIM AND DELIVERY:

See REPLEVIN.

CLAIMS:

Against county, see COUNTIES.
Against estate of decedent, see EXECUTORS AND ADMINISTRATORS.
Against city, presenting, see MUNICIPAL CORPORATIONS, 37.

COERCION:

Agreements procured by, see CONTRACTS, 3.

COLLISION:

Between automobile and bicycle, see HIGHWAYS.
Between automobile and pedestrian, see MUNICIPAL CORPORATIONS, 29.
Between street car and vehicle, see STREET RAILROADS, 3.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.

COMMISSIONS:

To establish lost corner, see BOUNDARIES.
Of broker, see BROKERS.
To take testimony, see DEPOSITIONS.

COMMITTEE:

Power of central committee to declare vacancy on ticket, see ELECTIONS, 4.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY DEBT:

Vacation of judgment against husband on community debt, see JUDGMENT, 3.

COMMUNITY PROPERTY:

See HUSBAND AND WIFE, 4, 5.

COMPENSATION:

Of attorney, see ATTORNEY AND CLIENT, 2.
Of broker, see BROKERS.
For performance of contract, see CONTRACTS, 4.
Of corporate officers, see CORPORATIONS, 6.
For property taken or damaged for public use, see EMINENT DOMAIN, 4, 6.
Of attorney on foreclosure of mortgage, see MORTGAGES, 4, 5.
Of receiver, see RECEIVERS, 2.

COMPLAINT:

In civil actions, see PLEADING, 6, 7.

COMPROMISE AND SETTLEMENT:

See ACCORD AND SATISFACTION.
Compromise of suit as distinguished from agreement to arbitrate, see STIPULATIONS, 1.

COMPROMISE AND SETTLEMENT—CONTINUED.

1. COMPROMISE AND SETTLEMENT—RESCISSION—PART PERFORMANCE—ARBITRATION AND AWARD. Where a contract for the compromise of a suit to quiet title has been partly performed by the execution of a deed to the defendants and entry of the judgment adjudging plaintiffs' title to the balance, the defendants cannot rescind for failure of the arbitration as to an incidental matter of fixing the market value of land which they were to purchase from the plaintiffs. *Cogswell v. Cogswell*..... 178

2. SAME—RESCISSION—RETENTION OF BENEFITS. A party cannot rescind a compromise of a suit while retaining a deed of lands made pursuant to the compromise, without any offer to reconvey the land deeded. *Cogswell v. Cogswell*..... 178

CONCLUSION:

In pleading, see PLEADING, 1.

CONCLUSIVENESS:

Of judgment on an award, see ARBITRATION AND AWARD.
Of judgment, see JUDGMENT, 4, 5.
Acceptance of work under city contract, see MUNICIPAL CORPORATIONS, 21.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITIONS:

Precedent to suit to dissolve corporation, see BUILDING AND LOAN ASSOCIATIONS, 4.
Precedent to action against county, see COUNTIES.
Precedent to enforcement of guaranty agreement, see GUARANTY.
In mortgages, see MORTGAGES, 1-3.
Precedent to enforcement of constructive trust, see TRUSTS, 2.

CONFIRMATION:

Of execution sale to sheriff, see JUDICIAL SALES, 1.

CONGRESS:

Judicial notice of act of, see EVIDENCE, 1.

CONSIDERATION:

Of bill of exchange or promissory note, see BILLS AND NOTES, 1.
Of contract, see CONTRACTS, 1-3.
Reimbursement to agent secretly obtaining title to property, see TRUSTS, 2.

CONSTABLES:

See SHERIFFS AND CONSTABLES.

CONSTITUTIONAL LAW:

Right to assemble, see ELECTIONS, 1.
Eligibility of judge to other office during term, see JUDGES, 1.
Creation of port districts, see MUNICIPAL CORPORATIONS, 1, 2.
Limitation of municipal indebtedness, see MUNICIPAL CORPORATIONS, 30-32.
Subjects and titles of statutes, see STATUTES, 1.
Uniformity of taxes, see TAXATION.

CONSTRUCTION:

Of mortgage note, see BILLS AND NOTES, 2.
Of contract to forward goods, see CARRIERS, 1.
Of contract, see CONTRACTS, 4.
Of resolution fixing salaries of officers, see CORPORATIONS, 6.
Of deed, see DEEDS, 2.
Of stipulation for taking of deposition, see DEPOSITIONS, 2, 3.
Of indemnity insurance policy, see INSURANCE.
Of statutes providing for local option elections, see INTOXICATING LIQUORS, 1, 2.
Of local option law as to sales and delivery in dry unit, see INTOXICATING LIQUORS, 6, 7.
Of lease, see LANDLORD AND TENANT, 1, 2.
Of stipulation in mortgage, see MORTGAGES, 1-3.
Of contract for public works, see MUNICIPAL CORPORATIONS, 17-20.
Of port district act, see MUNICIPAL CORPORATIONS, 35.
Of statute giving lien for cost of work in filling state tide lands, see PUBLIC LANDS, 3.
Of statute providing for indemnity bond to sheriff on service of process, see SHERIFFS AND CONSTABLES.
Of statute, see STATUTES, 2.
Of stipulation, see STIPULATIONS.
Deeds for right of way, see STREET RAILROADS, 1.
Of contract, see TRIAL, 3.
Of statute providing for written instructions to jury, see TRIAL, 4.
Of land contract, see VENDOR AND PURCHASER, 1.
Of will, see WILLS, 7.

CONSTRUCTIVE TRUSTS:

See TRUSTS.

CONTEST:

Of will by next of kin, see DESCENT AND DISTRIBUTION.
Of election, see ELECTIONS, 6, 8-11.
Of will, limitation of action, see LIMITATION OF ACTIONS.
Of will, see WILLS, 1-4, 8.

CONTINUANCE:

1. CONTINUANCE—ABSENCE OF EVIDENCE—ABUSE OF DISCRETION. In an action by the state to dissolve an unlawful building and loan association, tried by the court without a jury, it is an abuse of discretion to refuse a continuance for less than one day to enable the state to obtain competent proof of the prerequisite auditor's notice to the attorney general to prosecute the suit, if, by any misunderstanding, counsel for the state had failed to prove such preliminary fact. *State ex rel. Tanner v. Northwestern Investment Co.* 381

CONTRACTORS:

Liens in favor of for filling state tide lands, see PUBLIC LANDS, 2, 3, 6, 7.

CONTRACTS:

See BILLS AND NOTES; BONDS; COMPROMISE AND SETTLEMENT; DEEDS; GUARANTY; INSURANCE; SALES.
Duty to account for profits under, see ACCOUNT.
Of employment, see ATTORNEY AND CLIENT, 2.
For broker's commission, see BROKERS.
To forward goods, see CARRIERS, 1, 2.
Of corporation, see CORPORATIONS, 7, 8.
Damages for breach, see DAMAGES, 1, 3.
Best and secondary evidence of performance under, see EVIDENCE, 2.
Parol modification of, see EVIDENCE, 6.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Leases, see LANDLORD AND TENANT.
Ground for mechanics' liens, see MECHANICS' LIENS.
For public improvements, see MUNICIPAL CORPORATIONS, 16-22, 25.
For filling state tide lands, see PUBLIC LANDS, 2-8.
Specific performance, see SPECIFIC PERFORMANCE.
Stipulation in actions, see STIPULATIONS.
For right of way, see STREET RAILROADS, 1.
Construction of, see TRIAL, 3.
Sales of realty, see VENDOR AND PURCHASER.
For water, see WATERS AND WATER COURSES, 9.

1. CONTRACTS—BUILDING CONTRACTS—ASSENT—CONSIDERATION — EVIDENCE—SUFFICIENCY. The evidence is insufficient to sustain a verdict to the effect that a contract was entered into whereby the defendant, a general contractor, was to sublet to the plaintiff a part of contemplated city work, provided he obtained the city contract in consideration of the plaintiff's making an estimate on that part of the work, where it appears that the plaintiff's estimate was largely in excess of the limit fixed by the city, it was not shown that the defendant used the estimate and it was customary for subcontractors to furnish such estimates and there was no other consideration for the contract. *Meacham v. Pederson*..... 479

CONTRACTS—CONTINUED.

2. CONTRACTS—CONSIDERATION. A promise to pay one's own judgment is without consideration. *Ford v. Aetna Life Ins. Co.*..... 29

3. CONTRACTS—COERCION—CONSIDERATION—VALIDITY. Where plaintiff had paid out $300 to release a collateral note of $750, in consideration of which defendant was to give plaintiff a guaranty note for $300, and the $750 collateral note having come into the defendant's possession, he refused to surrender it or give the guaranty note until plaintiff had promised to pay a third party $200, such promise was coerced and void as without valid consideration. *Taylor v. Howard* 217

4. CONTRACTS—CONSTRUCTION—BREACH. Under a contract whereby the plaintiffs agreed to dig a well at a specified price per foot and the defendants to furnish the necessary casing, the plaintiffs are entitled to the agreed compensation if the defendants, within a reasonable time after demand, refused to furnish the casing reasonably necessary for the prosecution of the work. *Buffington v. Henton*. 44

5. CONTRACTS—PERFORMANCE—EVIDENCE—SUFFICIENCY. Findings that a subcontractor completed his grading contract are sustained by evidence that the assistant city engineer set stakes to indicate the final line of the grade, that the contractor graded to the line marked, and that the work was finished with such grading. *Grant v. Lilienthal* 57

6. CONTRACTS—BREACH—SUBSTITUTION—WAIVER OF BREACH. In an action for breach of a contract to employ plaintiff's teams at a stated sum per diem, the jury was warranted in finding that defendant's offer to give the plaintiff employment at hauling sand at a stated sum per load was with a view to substituting it for the old contract, acceptance of which would have waived the breach. *Waldrip v. Hill*..... 187

CONTRIBUTORY NEGLIGENCE:

Of passenger, see CARRIERS, 10.
Of traveler injured on highway, see HIGHWAYS.
Of servant, see MASTER AND SERVANT, 8-10.
Of person injured on street, see MUNICIPAL CORPORATIONS, 29.
Of person injured by street railroad, see STREET RAILROADS, 3.

CONVENTIONS:

Nomination of candidates, see ELECTIONS, 1, 2.

CONVEYANCES:

See DEEDS; MORTGAGES.
In fraud of creditors, see FRAUDULENT CONVEYANCES.
From husband to wife, see HUSBAND AND WIFE, 4.
Contracts to convey, see VENDOR AND PURCHASER.
Devisees, see WILLS.

CORNERS:

Establishment of lost corner, see BOUNDARIES.

CORPORATIONS:

See BENEFICIAL ASSOCIATIONS; BUILDING AND LOAN ASSOCIATIONS; MUNICIPAL CORPORATIONS.

Abatement of action against, see ABATEMENT AND REVIVAL.

Notice of accident given to dissolved corporation, see MASTER AND SERVANT, 1.

Taxation of corporations and corporate property, see TAXATION.

Property held in trust by agent of, see TRUSTS.

Water companies, service to consumers, see WATERS AND WATER COURSES, 6-8.

1. CORPORATIONS—STOCK—SUBSCRIPTION—TRUSTEE OR AGENT. Where one subscribed for stock as a trustee for certain creditors, it is immaterial to his liability on his subscription, so far as third persons dealing with the company are concerned, whether the creditors consented or not, since the subscriber was the owner, either as trustee, or as an agent who subscribed in his own name. *Munson v. Gunder*..... 629

2. CORPORATIONS—STOCK—SALE—ACTION FOR PRICE—INSTRUCTIONS. In an action for the price of stock sold, in which the only issue is whether defendant agreed to buy it from the original subscriber, it is prejudicial error to instruct that the defendant would not be liable to the plaintiff if he subscribed for or agreed to take the stock of the company and pay it therefor; since it injected an immaterial matter as potentially determinative of the case. *Munson v. Gunder*..... 629

3. CORPORATIONS — STOCK — SALE — OPTION TO RESELL — TIME AND METHOD OF EXERCISE. An agreement providing that, in case plaintiff should be discharged from defendant's employ, the defendant would, within six months thereafter, at plaintiff's option, take redelivery of defendant's corporate stock purchased by plaintiff, and repay plaintiff par therefor, fixes an option for a fixed period which must be exercised within the six months by redelivery of the stock, and it is not sufficient that notice of election to redeliver, with a demand, was made by letter posted within the time limit. *Olsen v. Northern Steamship Co*..... 493

4. SAME—OPTION—TENDER—WAIVER. Failure to answer a letter giving notice of an election to exercise an option to redeliver stock, posted on the last day of the option period, does not constitute a waiver of the failure to tender the stock as required by the option, where the letter was not received until the option period had expired. *Olsen v. Northern Steamship Co*..... 493

5. CORPORATIONS—STOCK—TRANSFERS IN BAD FAITH—STOCK PLEDGED —POSSESSION. Where corporate stock was pledged by two promoters as collateral to a note, which was paid by one of them, who there-

CORPORATIONS—CONTINUED.

upon took the stock and held it until transferred to him in satisfaction of a judgment in his favor for contribution, an assignment, *pendente lite*, to a third person by the defendant who did not have possession or control of it, not made in good faith, is ineffectual and void. *Soderberg v. McRae* 235

6. CORPORATIONS—OFFICERS—SALARIES—RESOLUTION — CONSTRUCTION. A resolution fixing the salaries of two officers of a corporation at $50 and $30 per week, "it being understood that the said salaries would be paid out of the net proceeds of the business," makes the salaries conditional, and the only fund out of which they can be paid is the net proceeds during the time the offices were held. *Mutual Adjustment Co. v. Ouellette* 693

7. CORPORATIONS—REPRESENTATION—ACTS OF OFFICERS—CONTRACTS—QUESTION FOR JURY. A *prima facie* case of authority of the president of a corporation to hire automobiles is established, where the company owned a platted addition where it was selling lots, and the principal use of the automobiles was to carry prospective purchasers from the city to the addition to inspect lots. *Merrill v. Caro Investment Co* 482

8. CORPORATIONS—ULTRA VIRES ACTS—REPURCHASE OF STOCK. If a sale of stock to a corporate employee, with an agreement by the corporation to repurchase its own stock in case of discharge, was *ultra vires*, it was divisible, and not being void *in toto*, the sale was absolute. *Olsen v. Northern Steamship Co* 493

9. CORPORATIONS—DISSOLUTION—ACTION BY TRUSTEES. Where the secretary of state has dissolved a corporation for nonpayment of its license fees, it is deemed effective until set aside, and an action to recover its property may be maintained by the only trustee who is a stockholder, in view of Rem. & Bal. Code, § 3715d, providing that on such dissolution, its trustees hold its property for the benefit of its stockholders and creditors. *Soderberg v. McRae* 235

10. CORPORATIONS—DISSOLUTION—ABSORPTION BY NEW CORPORATION—LIABILITY. Where an old corporation had been dissolved by the secretary of state for nonpayment of its license fees, without notice to its trustees, who, when they learned of the fact, organized a new corporation and conveyed to it all the assets without other consideration than the issue of its capital stock to the old stockholders, thereby absorbing the old company, the new corporation is liable upon all the obligations of the old corporation. *Jones v. Francis* 676

COSTS:

Allowance in proceedings against delinquent child, see INFANTS.
Allowance of attorney's fees after tender of amount due on note and mortgage, see MORTGAGES, 5.

COSTS—CONTINUED.

Of filling state tide lands, see PUBLIC LANDS, 3-5.
For extending service pipe to lot line of consumer, see WATERS AND WATER COURSES, 6-8.

1. COSTS—LIABILITY OF COUNTY—JUVENILE COURTS — INFANTS — PROCEEDINGS. There is no power to award costs against a county, upon dismissing proceedings before the juvenile court against a delinquent child and her parent, in the absence of any express statutory authority therefor, whether the proceeding be civil or criminal in its nature. *Pierce County v. Magnuson*..... 639

2. COSTS—ON APPEAL—PARTIAL REVERSAL. On reversing a judgment as to one defendant and affirming as to another, where there was no segregation of the appeals, plaintiff will recover one-half of its costs, and pay to the successful defendant one-half of the appellant's costs. *Hallidie Co. v. Washington Brick, Lime & Mfg. Co*..... 80

COUNCIL:

See MUNICIPAL CORPORATIONS, 7.

COUNTIES:

Liability for costs, see COSTS, 1.
Acquiring waters by prescription, for watering trough in highway, see WATERS AND WATER COURSES, 1.

1. COUNTIES—ACTIONS—CONDITIONS PRECEDENT—CLAIMS—NECESSITY. Rem. & Bal. Code, § 3918, requiring claims against a county to be presented to the county commissioners for allowance before any action can be brought thereon has no application to an equitable suit to restrain the county from interfering with or diverting the flow of springs claimed by the plaintiff. *Kiser v. Douglas County* 242

COURTS:

Review of decisions, see APPEAL AND ERROR.
Grant of supersedeas by appellate court, see APPEAL AND ERROR, 8, 9.
Liability of county for costs in proceedings before juvenile court, see COSTS, 1.
Election contest, see ELECTIONS, 6.
Condemnation proceedings, see EMINENT DOMAIN.
Allowances for widow's support, see EXECUTORS AND ADMINISTRATORS.
Judges, see JUDGES.
Prohibition to courts, see PROHIBITION.
Appointment of receiver, see RECEIVERS, 1.
Province of court and jury, see TRIAL, 2, 3.
Regulation of water company, see WATERS AND WATER COURSES, 8.

1. COURTS—DECISIONS—STARE DECISIS. A settled construction of statutes respecting practice will not be departed from unless the gravest necessity exists therefor. *Hallidie Co. v. Washington Brick, Lime & Mfg. Co*..... 80

COURTS—CONTINUED.

2. COURTS—APPELLATE COURTS—JURISDICTION—MANDAMUS TO STATE OFFICERS—ELECTIONS—CONTEST. The supreme court has original jurisdiction to issue a writ of mandamus to the secretary of state to compel him to certify to a nomination; the jurisdiction extending to state officers who are proceeding contrary to law, although the issues involve only the private rights of individuals contesting for the office. *Hill v. Howell*..... 603

COVENANTS:

Breach of, in leases, see LANDLORD AND TENANT, 3-5.

CREATION:

Of port districts, see MUNICIPAL CORPORATIONS, 1-6.

CREDIBILITY:

Of witness as question for jury, see TRIAL, 1.
Of witness, see WITNESSES.

CREDITORS:

Allowance of claims to, see EXECUTORS AND ADMINISTRATORS.
Conveyances in fraud of, see FRAUDULENT CONVEYANCES.

CRIMINAL LAW:

See HOMICIDE.
Violation of liquor laws, see INTOXICATING LIQUORS, 6, 7.

1. CRIMINAL LAW—"CRUEL PUNISHMENT"—DISCRETION OF LEGISLATURE. The operation of vasectomy for the prevention of procreation, authorized by Rem. & Bal. Code, § 2287, cannot be judicially determined to be cruel punishment, in violation of Const., art. 1, § 14, where the sentence required it to be carefully and skilfully performed and there was no showing that it was attended with any marked degree of physical torture, suffering or pain; the rule being that the discretion of the legislature in fixing penalties will not be disturbed except in extreme cases. *State v. Feilen*..... 65

2. CRIMINAL LAW—APPEAL—SENTENCE—PARTIAL VALIDITY. The fact that cruel punishment is inflicted does not warrant the reversal of a conviction, since the conviction would be affirmed with directions to enforce the legal part of the sentence. *State v. Feilen*..... 65

CROSS-COMPLAINT:

Against codefendant in foreclosure of lien, see MECHANICS' LIENS, 2.

CROSS-EXAMINATION:

Order of proof, see EVIDENCE, 5.

CUSTODY:

Of goods in course of transportation, see CARRIERS, 1, 2.

DAMAGES:

By reason of injunction bond, see BONDS.
For wrongful death, see DEATH.
Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 4, 6.
For fraud, see FRAUD, 2-4.
Alienation of affections, see HUSBAND AND WIFE, 1-3.
For breach of covenant to furnish heat, see LANDLORD AND TENANT, 3.
For breach of stipulation in mortgage, see MORTGAGES, 1.
Injuries caused by public improvements, see MUNICIPAL CORPORATIONS, 25.
For breach of warranty, see SALES, 3, 4.
In lieu of specific performance, see SPECIFIC PERFORMANCE.

1. DAMAGES—BREACH OF CONTRACT—ELEMENTS. In an action for breach of a contract to continuously employ plaintiff's teams at a specified per diem for a stated period, the expense of feeding the teams is not an element to be deducted, since it was not an expense incurred solely in the prosecution of the work, and it must be incurred regardless of the performance of the contract. *Waldrip v. Hill* 187
2. DAMAGES—PERSONAL INJURIES—RESULTING MISCARRIAGE. In an action for personal injuries which resulted four days later in a miscarriage attended with unusual pain, suffering and bodily injury, plaintiff may recover for the pain and suffering and mental anguish by reason of the miscarriage. *Raynor v. Tacoma R. & Power Co.* 133
3. DAMAGES—BREACH OF CONTRACT—DUTY TO MITIGATE DAMAGE. In an action for breach of a contract to employ teams continuously at a stated sum per diem for a definite period, lack of diligence on the part of the plaintiff to secure other work for his teams is not shown by his refusal of defendant's offer to employ his teams in hauling sand at a stated price per load, where that involved the additional expense of employing teamsters and a man to assist in loading and the profits were uncertain. *Waldrip v. Hill*..... 187
4. DAMAGES—PERSONAL INJURIES — MEASURE OF DAMAGES — DEPENDENT FAMILY. In an action for personal injuries, it is not prejudicial error to allow the plaintiff to state that he is a man of family, consisting of a wife and three children, where it was not accompanied by proof of dependency of the family; as it is of a preliminary nature and weighs upon his credibility and good faith. *Eoff v. Spokane, Portland and Seattle R. Co.*..... 270
5. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $3,000, reduced by the trial court to $1,500, in favor of a carpenter 42 years of age for injuries to a foot, will not be reduced as excessive, where he was confined to his bed six weeks, and used crutches for some time, and was still lame and was suffering much pain six months after the injury, and the prospect for a complete recovery was reduced by his age. *Meigs v. Porter*..... 164

DAMAGES—CONTINUED.

6. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. Where a verdict for $10,000 for personal injuries resulting in traumatic neurasthenia was set aside as excessive, and on a retrial, a like verdict was rendered, the liability being admitted and the sole issue being the amount of damages, and it was not contended that the injuries were trivial, the verdict should not be set aside as excessive, when supported by plaintiff's evidence and by part of the expert witnesses. *Eoff v. Spokane, Portland and Seattle R. Co.*..... 270

7. DAMAGES—PERSONAL INJURIES—INSTRUCTIONS—DOUBLE DAMAGES. In an action for personal injuries which resulted in a miscarriage, instructions that the plaintiff could recover for pain and suffering and impairment of health and "also" for the pain and suffering and mental anguish by reason of the miscarriage, is not open to the objection that it authorized a double assessment for the miscarriage, where from all the instructions, it could not have been so understood by the jury. *Raynor v. Tacoma R. & Power Co.*..... 133

DEATH:

Burden of proving before contesting will, see DESCENT AND DISTRIBUTION.

Provision in contract for repayment of installments on death of purchaser, see VENDOR AND PURCHASER.

1. DEATH—ACTION FOR WRONGFUL DEATH—EXCESSIVE VERDICT. A verdict for $18,000, in favor of a widow and children, for the death of a coal miner, from 35 to 37 years of age, in good health and able to earn about $65 a month, and having a life expectancy of thirty years, is excessive and should be reversed unless $4,000 is remitted. *Delaski v. Northwestern Imp. Co.*..... 143

DEBT:

Promise to pay debt of another, see FRAUDS, STATUTE OF, 1, 2.

Indebtedness incurred by port district, see MUNICIPAL CORPORATIONS, 2.

Constitutional limitation, see MUNICIPAL CORPORATIONS, 30-32.

DEBTOR AND CREDITOR:

See FRADULENT CONVEYANCES.

DECEDENTS:

Estates, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

DECEIT:

See FRAUD.

DECISION:

On appeal, see APPEAL AND ERROR, 40-42.
Of court as rule of law, see COURTS, 1.
Of judge outside county, see JUDGES, 2.

DEDICATION:

1. DEDICATION—PLATS — STREETS — VACATION — NONUSER — RIGHT TO QUESTION—ESTOPPEL — STREET RAILWAYS — EASEMENTS. A railroad company having only an easement in a street, cannot object to grading the street on the ground that the street was abandoned by five years' nonuser and failure to open it, the abutting property owners not objecting; and the company having accepted an easement in the street and agreed to move its tracks thereto when the street was graded, it is estopped to question the right to grade the street. *Seattle, Renton & Southern R. Co. v. Seattle*..... 264

DEEDS:

Parol evidence to aid description, see EVIDENCE, 7.
Right of way deeds, see STREET RAILROADS, 1.

1. DEEDS—DELIVERY—ACCEPTANCE. A deed made to defendants in compromise of a suit to quiet title, pursuant to agreement, and delivered to and retained by their attorney with their knowledge, is accepted by them. *Cogswell v. Cogswell*..... 178

2. DEEDS — EXCEPTIONS — CONSTRUCTION AND OPERATION. Where grantors owned timber land beyond the granted land, and a sawmill to which the timber must be brought across the land conveyed, a reservation in the deed "excepting a strip of land thirty feet wide . . . for road purposes," must be reasonably construed as for the benefit of the grantor; and the use of a portion of the strip for a logging road, retaining the right of ingress and egress to the grantees, is not inconsistent with the terms of the exception clause, in view of the attendant facts and circumstances. *Delano v. Luedinghaus* 573

DEFAULT:

Increased interest after default in payment of installments of principal and interest, see MORTGAGES, 3.

DEGREES:

Reduction of degree of crime, see HOMICIDE, 2.

DELAY:

By mortgagee in performance of stipulation in mortgage, see MORTGAGES, 1.

DELIVERY:

Of deed, see DEEDS, 1.
Sale and delivery of liquor at brewery, see INTOXICATING LIQUORS, 6.

DENIALS:

In pleading, see PLEADING, 2.

DEPARTURE:

In pleading, see PLEADING, 5, 6.

DEPENDENCE:

Of family as element of damages, see DAMAGES, 4.

DEPOSITIONS:

1. DEPOSITIONS — STIPULATION — TAKEN UPON INTERROGATORIES — ADMISSIBILITY—PRESCENCE AND ACTS OF COUNSEL—EFFECT. Under a stipulation to take a deposition upon interrogatories and cross-interrogatories, on a commission, a party has no right to be represented by attorney when the deposition is taken; and if he is, the deposition will be suppressed. *Nasser v. Gaston*..... 685

2. DEPOSITIONS—STIPULATION FOR TAKING—CONSTRUCTION AND EFFECT. A stipulation for the taking of a deposition reserving the right to object "to any and all questions and answers," does not exclude the right to object to the manner in which it was taken and returned. *Nasser v. Gaston*..... 685

3. SAME. A stipulation for the taking of a deposition is not to be construed in connection with letters written by opposite counsel, when the letters were not acted on, and the stipulation shows the agreement of the parties. *Nasser v. Gaston*..... 685

4. DEPOSITIONS—CERTIFICATE AND RETURN—NECESSITY—SUFFICIENCY. A deposition taken on stipulation is properly suppressed where there is no certificate to it, and it was not returned to the clerk of the court conformably to Rem. & Bal. Code, §§ 1242, 1243, which was not substantially complied with, it not being shown by whom it was reduced to writing or that it was read to the witness. *Nasser v. Gaston* 685

5. DEPOSITIONS—MOTION TO SUPPRESS — TIME FOR APPLICATION. A motion to suppress a deposition need not be made before the trial, when it was not then filed, and the motion was made as soon as it was published and the grounds ascertainable. *Nasser v. Gaston*. 685

DESCENT AND DISTRIBUTION:

1. DESCENT AND DISTRIBUTION—HEIRS—PRESUMPTION — DEATH AND DIVORCE—WILLS—CONTEST—BURDEN OF PROVING HEIRSHIP. Where a testatrix, dying without issue, had separated from her husband three years before her death, her next of kin, in order to contest the will, must show that the husband was dead or divorced at the time of her death; there being no presumption from the lapse of such period of time. *In re Siebs' Estate*..... 374

DESCRIPTION:

Parol evidence to aid description in deed, see EVIDENCE, 7.

DEVISES:

See WILLS.

DILIGENCE:

In procuring newly discovered evidence, see NEW TRIAL, 3.
In prosecution of storage reservoir for irrigation, see WATERS AND WATER COURSES, 4.

DISABILITIES:

Effect on limitation, see LIMITATION OF ACTIONS, 5.

DISCRETION:

To grant new trial, see APPEAL AND ERROR, 17.
Of legislature to fix penalty for crime, see CRIMINAL LAW, 1.

DISCRETION OF COURT:

Refusal of continuance, see CONTINUANCE.
Disposition of property on annulment of marriage, see MARRIAGE, 2.
Abuse of in setting aside verdict as not sustained by evidence, see NEW TRIAL, 2.
Trial amendment of complaint, see PLEADING, 6.
Relief in action for specific performance, see SPECIFIC PERFORMANCE.
To submit interrogatories to jury, see TRIAL, 5.
Evidence in rebuttal to impeach witness, see WITNESSES.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see APPEAL AND ERROR, 14.
At trial, see TRIAL, 1.

DISSOLUTION:

Of corporation as abatement of action, see ABATEMENT AND REVIVAL.
Of corporation, see CORPORATIONS, 9, 10.
Notice of accident, to corporation after dissolution, see MASTER AND SERVANT, 1.

DIVORCE:

Burden of proving before contesting will, see DESCENT AND DISTRIBUTION.

1. DIVORCE—ADULTERY—EVIDENCE—SUFFICIENCY. In the absence of any denial, evidence of an adulterous disposition, coupled with opportunities to commit the act, and circumstances showing guilt, are sufficient to sustain a charge of adultery in an action for divorce. *Gust v. Gust*..... 685

2. DIVORCE—COMPLAINT—AMENDMENT. It is not error to allow a complaint for a divorce to be amended to set up a cause of action for the annulment of the marriage. *Sortore v. Sortore*..... 410

DOCUMENTS:

As evidence in civil actions, see EVIDENCE, 3-5.

DOUBLE DAMAGES:

See DAMAGES, 7.

DUPLICITY:

Of appeal, ground for dismissal, see APPEAL AND ERROR, 14.

EASEMENTS:

See DEDICATION.

ELECTION:

To exercise option to redeliver stock purchased, see CORPORATIONS, 3.
Of remedies by purchaser on breach of warranty, see SALES, 3.
To perform contract, see VENDOR AND PURCHASER, 2.
By contestant of will, see WILLS, 8.

ELECTIONS:

Mandamus to compel state officer to certify to nomination, see COURTS, 2.
Local option elections, see INTOXICATING LIQUORS, 1-5.
Port district election, see MUNICIPAL CORPORATIONS, 3-6.
Submitting question of charter amendment to vote, see MUNICIPAL CORPORATIONS, 7-12.
Submission to voters of plan for public improvements, see MUNICIPAL CORPORATIONS, 13-16.
Submission of issuance of municipal bonds to popular vote, see MUNICIPAL CORPORATIONS, 30, 33, 34.

1. ELECTIONS—NOMINATIONS—PRIMARY ELECTIONS—NOMINATIONS AT CONVENTIONS—EFFECT—CONSTITUTIONAL LAW—CIVIL RIGHTS—RIGHT TO ASSEMBLE. Under Rem. & Bal. Code, § 4826, relating to the election of precinct, county and state party committeemen, and the holding of party conventions, and providing that a convention shall have no power to nominate any candidates to be voted for at any primary election, a person nominated at a convention is not thereby disqualified from afterwards becoming a candidate at the September primaries; since to construe the law to have that effect would render it unconstitutional as violating Const., art. 1, § 4, providing that the right of petition and of the people peaceably to assemble for the common good shall not be abridged. *State ex rel. Wells v. Dykeman* 599

2. ELECTIONS—NOMINATIONS—CONVENTION—DEFINITION — MASS CONVENTION OUTSIDE COUNTY—LEGALITY. Under Rem. & Bal. Code, § 4794, defining a convention as an "organized assemblage of the electors or delegates representing a party or a principle," and Id., § 4830, requiring political parties which cast less than ten per cent at the last preceding election to nominate candidates at a con-

ELECTIONS—CONTINUED.

vention, county nominees of the progressive party, which cast no votes at the last election, are not named at a "convention," and are therefore not entitled to have their names placed on the general election ballot, where it appears that in K. county, a party primary election was held in but seven out of the thirty-one voting precincts to elect one delegate in each precinct to a state convention which had been called for September 10th, and one delegate to a county convention, that no notice of a county convention was given, but that, during a recess at the state convention held in another county, the five delegates elected to the county convention, with 25 to 40 others present from K. county, meeting as a convention of assembled electors of K. county, nominated progressive party candidates for county offices, without any pretense of holding a county convention in obedience to the invitation to elect delegates at the party primary, the proceedings showing that a mass convention only was held; since such a popular or mass convention, held outside of the county without notice is not fairly representative, would open the door to fraud, and is contrary to the spirit of the direct primary law designed to give every opportunity to participate in the selection of party nominees. *State ex rel. Peters v. Superior Court* 662

3. ELECTIONS—NOMINATIONS—ACTIONS TO RESTRAIN AUDITOR—PARTIES PLAINTIFF. Under the express provisions of the primary election law, any citizen of the county may maintain an action to restrain the county auditor from illegally placing upon the general election ballot the names of candidates as nominees of a political party who had not been legally nominated by such party. *State ex rel. Peters v. Superior Court*..... 662

4. ELECTIONS—NOMINATIONS—CANDIDATES OF TWO PARTIES—VACANCIES—POWER TO DECLARE OR FILL. Under the primary law requiring a person nominated for an office by two parties to designate the ticket upon which he desires his name to appear, the right to become a candidate of two or more parties is a valuable right, and the central committee of a political party authorized to fill vacancies has no power to declare a vacancy where the lawful nominee of two parties, in declining to be a candidate under both tickets, did not decline the nomination in writing in the manner required by Rem. & Bal. Code, § 4802. *State ex rel. Peters v. Superior Court* 662

5. ELECTIONS—PRIMARY ELECTIONS—RETURNS — DUTY TO CANVASS—PREPARATION OF BALLOTS—WHO MAY QUESTION—INTEREST OF AUDITOR. The county auditor, charged with the duty of printing on the election ballots separately the names of judicial candidates who received a majority of all votes cast, has no such interest in the matter as to entitle him to maintain an action to secure a count of the total number of ballots cast, without which such majority candidates could not be determined, where the canvassing board failed to determine

ELECTIONS—CONTINUED.

the question; since his duty as auditor is ministerial and limited to printing such names separately as affirmatively appear from the records of the canvassing board, on file in his office, to have received a majority of all votes cast; such returns being conclusive on him in the absence of a proceeding in behalf of any interested party. *State ex rel. Case v. Superior Court*..... 428

6. ELECTIONS—IRREGULARITIES—ELECTION BOARDS—RETURNS—REVIEW BY COURTS. Under Rem. & Bal. Code, § 4942, providing that no irregularity or improper conduct by election judges shall invalidate an election unless a person is thereby declared elected when he did not receive the highest number of legal votes, a contest of a primary election cannot prevail by reason of the fact that in one election precinct the polls were not kept open the full time and several electors were wrongfully excluded, one of whom would have voted for the contestant, or that one irregular vote was received by the contestee, where making due allowance for such votes, the contestee still received the highest number of votes, and there was no showing of fraud or intentional wrong or that the irregularities influenced the final result; nor should the votes of the precinct be thrown out because the polls were closed for the noon hour without any guard over the ballot boxes, in the absence of a showing that any harm resulted. *Hill v. Howell*..... 603

7. ELECTIONS—ELIGIBILITY OF CANDIDATES—WHO MAY QUESTION. A citizen and elector has the inherent right to maintain an action questioning the eligibility of a candidate for election to a public office. *State ex rel. Reynolds v. Howell*..... 467

8. ELECTIONS—CONTEST—ELECTORS WRONGFULLY EXCLUDED. In an election contest, the vote of an elector wrongfully excluded must be counted for the candidate for whom he testifies he would have voted, but can be counted for neither candidate when it is not shown how the elector would have voted. *Hill v. Howell*..... 603

9. ELECTIONS—CONTESTS—QUALIFIED ELECTORS. In an election contest, votes shown to have been cast for a candidate by electors who could not read or write the English language, must be deducted from the number of votes cast for such candidate. *Hill v. Howell* 603

10. SAME—QUALIFIED ELECTORS. Electors who can read the English language sufficiently to read the names of the different candidates and mark them without extrinsic aid are qualified electors, although they are unable to read English fluently or understandingly. *Hill v. Howell* 603

11. SAME—CONTESTS—QUALIFIED VOTERS — EVIDENCE — ADMISSIBILITY. In an election contest, evidence that an unqualified voter had stated to the witness that she had voted for a certain candidate is inadmissible as hearsay. *Hill v. Howell*..... 603

ELECTORS:

See ELECTIONS, 2, 6-11.

ELECTRICITY:

Condemnation of property by electric and power company, see EMINENT DOMAIN, 1, 2.

ELIGIBILITY:

Of candidate for election to public office, see ELECTIONS, 7.
Of judge during term as candidate for other office, see JUDGES, 1.

EMINENT DOMAIN:

1. EMINENT DOMAIN—PUBLIC USE—FUTURE AND PRESENT NEEDS—SURPLUS POWER—PRIVATE USE. A power and water company may condemn property for the public purposes of municipal lighting and of electric railways, notwithstanding it seeks to avail itself of Rem. & Bal. Code, § 4974, granting it the right to use for private purposes electricity generated for public purposes if at any time there should be a surplus of power not needed for public purposes; since it may anticipate future as well as present public needs, where it acts in good faith and seeks no excessive or unreasonable appropriation. *State ex rel. Lyle Light, Power & Water Co. v. Superior Court*..... 486
2. SAME—PUBLIC USE—SURPLUS POWER — EVIDENCE — SUFFICIENCY. Sufficient public necessity for condemnation is shown where an electric light and power company having agreed to furnish power to a town and an electric railway company, and, contemplating other contracts for power for public purposes only, sought to condemn to develop ten thousand horse power, although but a small part of such power was needed for the contracts already secured. *State ex rel. Lyle Light, Power & Water Co. v. Superior Court*..... 486
3. EMINENT DOMAIN—RAILROAD CROSSINGS — RESTRICTED USE — ADJUDICATION OF NECESSITY. Upon condemnation of a railroad crossing under Rem. & Bal. Code, § 8736, the court may, in view of the settled rule that the right can be limited and exercised in a stipulated manner, adjudge the public use subject to defendant's right to use a logging road and upon condition that the petitioner shall construct and keep in repair an overhead crossing for the logging road. *State ex rel. Union Lumber Co. v. Superior Court*.... 540
4. SAME—LIMITED USE—ADJUDICATION OF NECESSITY—FORM—SPECIFICATIONS FOR OVERHEAD CROSSING. An adjudication of public use and necessity for condemning a railroad crossing, on condition that the petitioner construct and maintain an overhead crossing for the defendant's logging road, is not objectionable in that it is not accompanied by specifications for the construction of a trestle and grade, since that can be left to the trial and the determination of

EMINENT DOMAIN—CONTINUED.

damages to be paid under a particular and designated use, to be shown by plats and appropriate specifications. *State ex rel. Union Lumber Co. v. Superior Court*..... 540

5. SAME—PUBLIC NECESSITY—OBJECTIONS — NECESSITY OF ACQUIRING OTHER LANDS. An adjudication of a public use and necessity for condemning a railroad crossing is not objectionable in that the petitioner must acquire other lands in order to carry out the scheme for an overhead crossing. *State ex rel. Union Lumber Co. v. Superior Court* 540

6. SAME — RAILROAD CROSSING — LIMITED USE — COMPENSATION—RESTRICTIONS. In condemning a railroad crossing on condition that the petitioner construct and keep in repair an overhead crossing for defendant's logging road, the court may limit the damages to the right condemned and the manner in which it is sought to be exercised. *State ex rel. Union Lumber Co. v. Superior Court*..... 540

EMPLOYEES:

See MASTER AND SERVANT.

ENFORCEMENT:

Of trust, see TRUSTS.

ENGINEERS:

Withholding certificate on completion of work, see MUNICIPAL CORPORATIONS, 23.

ENTRY:

Of judgment, see JUDGMENT, 1, 7.

EQUITABLE ESTOPPEL:

See ESTOPPEL.

EQUITY:

See ACCOUNT; SPECIFIC PERFORMANCE; TRUSTS.
Review in equitable actions, see APPEAL AND ERROR, 5.
Equitable estoppel, see ESTOPPEL.
Relief against trespass, see INJUNCTION.
Right to jury trial in equitable actions, see JURY.
Relief against excessive tax, see TAXATION, 2.

ESTABLISHMENT:

Of boundary, see BOUNDARIES.
Of heirship, see DESCENT AND DISTRIBUTION.
Of will, see WILLS, 5, 9.
Of lost will, see WILLS, 6.

ESTATES:

Decedents' estates, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

To assert forfeiture of membership in association, see BENEFICIAL ASSOCIATIONS.
Of state to dissolve corporation, see BUILDING AND LOAN ASSOCIATIONS.
Of railroad company to question right to grade street, see DEDICATION.
Of creditors to question jurisdiction of court to classify and allow claims, see EXECUTORS AND ADMINISTRATORS, 5.
By judgment, see JUDGMENT, 4, 5.
Of mortgagee to claim attorney's fee unreasonable, see MORTGAGES, 4.
Of city by acceptance of benefits under void contract, see MUNICIPAL CORPORATIONS, 16.

1. ESTOPPEL—EQUITABLE ESTOPPEL. Where judgment debtors were insolvent at the time judgment was entered and conditions did not change, a subsequent promise to pay the judgment by one who was garnishee therefor, does not estop the garnishee from denying liability to the judgment debtor. *Ford v. Aetna Life Ins. Co.*..... 29

EVIDENCE:

See DEPOSITION; FRAUDULENT CONVEYANCES; HOMICIDE.
Incorporation in record on appeal, see APPEAL AND ERROR, 10.
Harmless error in rulings on, see APPEAL AND ERROR, 27, 29-33.
On note, see BILLS AND NOTES, 3.
Location of lost corner, see BOUNDARIES, 2, 3.
Performance of contract by broker, see BROKERS.
Forfeiture of corporate franchise for noncompliance with laws, see BUILDING AND LOAN ASSOCIATIONS, 1.
Proof of notice to attorney general of noncompliance with laws by corporation, see BUILDING AND LOAN ASSOCIATIONS, 4.
Value of goods destroyed, see CARRIERS, 3.
For personal injuries, see CARRIERS, 5-7; HIGHWAYS.
Absence of ground for continuance, see CONTINUANCE.
Consideration for contract, see CONTRACTS, 1.
Of performance of contract, see CONTRACTS, 5.
Existence of family in action for injuries, see DAMAGES, 4.
Adultery, see DIVORCE, 1.
Election contest, see ELECTIONS, 11.
Condemnation proceedings, see EMINENT DOMAIN, 2.
In action for fraud, see FRAUD, 1-3.
In action for alienation of affections, see HUSBAND AND WIFE, 1.
In action for breach of covenant to furnish heat, see LANDLORD AND TENANT, 4.
To show modification of lease, see LANDLORD AND TENANT, 6.
Of insanity so as to toll statute in contest of will, see LIMITATION OF ACTIONS.
For injuries to servant in general, see MASTER AND SERVANT, 4, 6, 8, 9, 11-13.
New trial for insufficiency of, see NEW TRIAL, 2.

EVIDENCE—CONTINUED.

Agency, see PRINCIPAL AND AGENT.
Of cost of filling state tide lands, see PUBLIC LANDS, 5.
Adverse possession of right of way, see RAILROADS, 1.
To sustain injunction against trespass on right of way, see RAILROADS, 2.
Question of fact for jury, see TRIAL, 1.
Undue influence procuring execution of will, see WILLS, 2-4.
Testamentary capacity, see WILLS, 5.
To establish lost will, see WILLS, 6.
Testimony of witnesses, see WITNESSES,

1. EVIDENCE—JUDICIAL NOTICE—ACT OF CONGRESS. Upon an issue as to the title of the Northern Pacific right of way, the courts will take judicial notice of the Act of Congress of July 2, 1864, granting a right of way to the company over public lands. *Northern Pac. R. Co. v. Wadekamper*..... 392

2. EVIDENCE—BEST AND SECONDARY—CONTRACTS—CHECKS AND SLIPS. In an action to foreclose a lien for excavation work, there was competent evidence of the amount of earth removed, where it appears that plaintiff's foreman, who could not be found at the time of trial, signed daily slips showing the number of loads removed, his signature was identified, the bookkeeper examined and totaled the slips, the total checked with the sum paid by a third party to whom the dirt was sold and delivered, as evidenced by an indorsed check marked paid with a notation on the back as to the number of loads, and the parties had agreed as to the yardage of each load. *Maher & Co. v. Farnandis*..... 250

3. EVIDENCE—DOCUMENTARY EVIDENCE — BOOK ENTRIES — ADMISSIBILITY. Entries in account books of a corporation are admissible, where the employee who made the original notations with knowledge of the transaction had left the country, and could not be found or produced, and his employment, duties and handwriting were proven. *Pioneer Sand & Gravel Co. v. International Contract Co*..... 123

4. EVIDENCE—DOCUMENTARY EVIDENCE—ASSIGNMENTS. The original assignments of tide land contracts, executed in due form and acknowledged before a notary, are competent proof of the fact of the assignments; even if they were recorded without any authority of law. *Richards v. Bussell*..... 554

5. EVIDENCE—CROSS-EXAMINATION—ORDER OF PROOF. Upon cross-examination, it is proper to exclude documentary evidence which was no part of the cross-examination, even if it were admissible at some other time. *Berens v. Cox*..... 627

6. EVIDENCE—PAROL MODIFICATION OF WRITTEN CONTRACT. A parol modification of a written contract must be established by clear and convincing evidence. *Dinsmore Sawmill Co. v. Falls City Lumber Co.*..... 42

EVIDENCE—CONTINUED.

7. EVIDENCE — PAROL EVIDENCE — DEEDS — DESCRIPTION — IDENTIFICATION OF PROPERTY—BONA FIDE PURCHASERS. It is admissible to show by parol, to aid in the description of "Block 95, Edmonds" in a sheriff's deed, and to identify the property, that the "Plat of Edmonds" had no block 95, while there was such a block in the "Plat of the City of Edmonds," and no other block of that number within the corporate limits; and such description is sufficient to put *bona fide* purchasers upon inquiry. *Konnerup v. Milspaugh*..... 415

EXCEPTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 3-5.
In deed, construction, see DEEDS, 2.

EXCESSIVE DAMAGES:

See DAMAGES, 5, 6.
For wrongful death, see DEATH.
For alienation of affections, see HUSBAND AND WIFE, 3.

EXECUTION:

Sales made under execution, see JUDICIAL SALES, 1-3.
Of will, see WILLS, 1-4.

EXECUTORS AND ADMINISTRATORS:

Probate of will, see WILLS, 1-4, 8.

1. EXECUTORS AND ADMINISTRATORS—CLAIMS—ALLOWANCE TO WIDOW —PREFERRED CLAIMS. Under Rem. & Bal. Code, §§ 1466,1467, and 1571, authorizing allowances for the support of the widow which are preferred over all claims except funeral charges and costs of administration, the court may classify and allow, as preferred, claims for caring for the widow at a hotel and hospital, doctor's and nurse's charges, and her brother's expenses in a trip from the east to care for her, where the deceased and widow were fatally injured in an accident while temporarily in the state, in view of the gravity and manifest necessities of the case. *In re Bell's Estate* 498

2. SAME — ALLOWANCE TO WIDOW — PREFERRED CLAIMS — NOTICE — WAIVER—GENERAL APPEARANCE. There is a general appearance in probate, which waives jurisdictional objections to an order classifying claims and directing preferred allowances because of want of notice of final settlement provided by Rem. & Bal. Code, §1562, where the parties had actual notice of the hearing, asked and obtained a continuance, and stipulated for a hearing at a later date, at which they had full opportunity to be heard. *In re Bell's Estate* 498

3. SAME—CLAIMS—JURISDICTION—NOTICE — NECESSITY. The jurisdiction of the court to make allowances for the widow's support which are preferred to claims of other creditors does not depend upon the notice to all creditors required on final settlement, as

EXECUTORS AND ADMINISTRATORS—CONTINUED.

against creditors who had actual notice; nor as to other persons having claims, in view of the opportunity of such claimants to be heard on final settlement. *In re Bell's Estate*..... 498

4. SAME—CLAIMS—ANCILLARY ADMINISTRATION. Upon an ancillary administration in this state upon the estate of a resident of Kentucky dying in this state, the court may make allowances for the support of the widow while being cared for in this state, without having the claims passed upon by the probate court of Kentucky. *In re Bell's Estate*..... 498

5. SAME — OBJECTIONS TO CLAIMS — ESTOPPEL — INCONSISTENT POSITION. Creditors filing claims in an ancillary administration in this state, and asking their allowance by the courts of this state, are estopped to question the jurisdiction of the court to classify and allow the claims filed. *In re Bell's Estate*..... 498

EXEMPTIONS:

Filing certificate containing names of firm and persons conducting business, see PARTNERSHIP.

EXPERT TESTIMONY:

In criminal prosecution, see HOMICIDE, 4.

As to safety of method and place of work, see MASTER AND SERVANT, 11.

EXTRAS:

Recovery for by contractor on public work, see MUNICIPAL CORPORATIONS, 17-20.

FACTORY ACT:

Guarding machinery under factory act, see MASTER AND SERVANT, 1, 10, 13.

FAMILY:

Evidence of existence of in action for injuries, see DAMAGES, 4.

FEES:

Of attorney, see ATTORNEY AND CLIENT, 2.

Of attorney on foreclosure of mortgage, see MORTGAGES, 4, 5.

Allowance to attorney on foreclosure of liens for cost of filling state tide lands, see PUBLIC LANDS, 7.

FELLOW SERVANTS:

See MASTER AND SERVANT, 2-4.

FILING:

Certificate containing firm name and persons conducting business, see, PARTNERSHIP.

FINAL JUDGMENT:

Appealability, see APPEAL AND ERROR, 7.

FINDINGS:

Review as dependent on exceptions in lower court, see APPEAL AND ERROR, 3-5.
Review as dependent on record on appeal, see APPEAL AND ERROR, 10.
Review on appeal, see APPEAL AND ERROR, 18-25.

FIRES:

Loss of goods by fire, see CARRIERS, 1-3.

FORCIBLE ENTRY AND DETAINER:

As bar to injunction, see INJUNCTION, 1.

FORECLOSURE:

Of lien, see MECHANICS' LIENS.
Of mortgage, see MORTGAGES, 4, 5.
Of lien for cost of filling state tide lands, see PUBLIC LANDS, 7, 8.

FORFEITURE:

Of membership, see BENEFICIAL ASSOCIATIONS.
Of corporate franchise, see BUILDING AND LOAN ASSOCIATIONS.

FORMER ADJUDICATION:

See JUDGMENT, 4, 5.

FRANCHISE:

Forfeiture of by corporation, see BUILDING AND LOAN ASSOCIATIONS.
Duty of water company in serving consumer under, see WATERS AND WATER COURSES, 6, 7.

FRAUD:

See BILLS AND NOTES, 3; FRAUDULENT CONVEYANCES.
In execution sale to sheriff, see JUDICIAL SALES, 1-3.
Of agent in acquiring property of corporation, see TRUSTS.

1. FRAUD—DECEIT—EVIDENCE—ADMISSIBILITY. In an action for damages for deceit in misrepresenting the price paid by defendant for a forty-acre tract of land, one-half of which was taken by the plaintiff, evidence of similar representations to another party who took the other half of the land is admissible as tending to show the representations made to the plaintiff, where the two sales were parts of one and the same transaction. *Carnahan v. Moore*.... 623

2. FRAUD — ISSUES AND PROOF — EVIDENCE — ADMISSIBILITY. In an action on a land trade, in which the answer alleged fraud by the plaintiff in misrepresenting the character of the land as susceptible to irrigation, evidence as to the value of the land is not objectionable because not coupled with the appurtenant water rights; and it was proper to rule and instruct that no damages were claimed by defend-

FRAUD—CONTINUED.

ant because of failure to have water on the land, where practically all the testimony segregated the value of the land and the value of the water rights, and there was no claim that the plaintiff did not convey the water rights according to representations. *Grant v. Huschke* 174

3. FRAUD — FALSE REPRESENTATIONS — ACTION FOR DAMAGES — EVIDENCE—SUFFICIENCY. The evidence does not warrant the rescission of a sale of hotel fixtures on account of fraudulent representations by the seller as to the expense of running the hotel and the cost of the fixtures, where wilful misstatements are not shown, the average cost was correctly stated, without any considerable variation, and the estimated expenses depended largely on individual care and economy, and there was no attempt to show that the defendants did not pay for the fixtures the stated cost. *Thurston v. Cohn*.. 275

4. FRAUD—DECEIT—MISREPRESENTING PRICE PAID — MEASURE OF DAMAGES. Where defendant induced plaintiff to purchase, with him, certain lands by misrepresenting the price paid, the plaintiff can recover damages for the deceit, the measure being the difference between the price paid by defendant and the price paid to him by the plaintiff; the value of the land being immaterial as the plaintiff is entitled to his profit. *Carnahan v. Moore*..... 623

FRAUDS, STATUTE OF:

1. FRAUDS, STATUTE OF—DEBT OF ANOTHER. Where an insurance company was liable on an indemnity policy only after actual payment of the judgment, the agent's oral promise to plaintiff to pay the judgment was the promise to pay the debt of another, and void as within the statute of frauds. *Ford v. Aetna Life Ins. Co*.... 29

2. FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER. An oral promise by defendant to pay plaintiff any sum up to $300 which, on final settlement between plaintiff and a third person, might be found due to the plaintiff, is within the statute of frauds. *Taylor v. Howard* 217

3. FRAUDS, STATUTE OF—JUDICIAL SALES. Judicial sales do not fall within the statute of frauds. *Rice v. Ahlman*..... 12

4. FRAUDS, STATUTE OF—ORAL MODIFICATION OF WRITTEN LEASE—PART PERFORMANCE. The rule that an oral modification of a written lease is void has no application, where it appears that the oral agreement was partially performed by allowing the lessee to remain in possession and pay rent to a third party pending the termination of litigation between the lessor and the third party, and that the lessor subsequently recognized it by forbearance in neither demanding nor collecting rent. *Oregon and Washington R. Co. v. Elliott Bay Mill & Lumber Co*..... 148

FRAUDS, STATUTE OF—CONTINUED.

5. FRAUDS, STATUTE OF—DEFENSES — PLEADING — NECESSITY. Where the complaint in an action upon an oral contract guaranteeing the debt of another alleged the loan of money in general terms without disclosing the true foundations of the case, the defendant may, under the plea of the general issue, take advantage of the statute of frauds; although ordinarily he could not do so without specially pleading it. *Taylor v. Howard*..... 217

FRAUDULENT CONVEYANCES:

1. FRAUDULENT CONVEYANCES — PRESUMPTIONS — BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. Under Rem. & Bal. Code, § 5292, providing that, where any question arises as to the good faith of a transaction between husband and wife, the burden of proof shall be upon the party asserting the good faith, the presumption that a transfer by a husband to a wife of 199 shares of corporate stock, valued at $14,000, is fraudulent as to creditors, is not overcome by clear and satisfactory proof, as required, where it appears that the husband was indebted on a judgment for $8,900, that he was being pressed for payment, that his claim that he did not know of the judgment was unfounded in fact, and that he claimed that the transfer was in consideration of $5,000 borrowed and of other stock which he had borrowed and was holding for his wife, which at one time was of the value of $9,000, but was worth only $1,000 at the time of the transfer of the stock in question; and it further appears that the $5,000 came from the sale of a house valued at $7,500 to which the husband had contributed $6,000, that he had made statements that he owned the stock, admitted that he had no intention of paying the judgment, and his evidence was wholly uncorroborated. *Dill v. Carver* 103

GARNISHMENT:

Promise to pay judgment against insolvent debtors as estoppel of garnishee to deny liability, see ESTOPPEL.

Departure in garnishment proceedings, see PLEADING, 4.

1. GARNISHMENT—RIGHTS ACQUIRED. The plaintiff in garnishment acquires no better right to the debt than his debtor has. *Ford v. Aetna Life Ins. Co*..... 29

GOOD FAITH:

Of purchaser, see BILLS AND NOTES, 3.

GRANTS:

Of public lands, see PUBLIC LANDS, 1.

GUARANTY:

1. GUARANTY—CONDITIONS PRECEDENT. A promise by defendant to pay plaintiff any sum up to $300 which, on final settlement between plaintiff and a third person, might be found due to the plaintiff, cannot be enforced until a final settlement in which a sum is found due the plaintiff. *Taylor v. Howard*..... 217

HARBORS:

Improvement by port district, see MUNICIPAL CORPORATIONS, 2, 14, 32-35.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 26-39.

HEARSAY EVIDENCE:

In election contest, see ELECTIONS, 11.

HEIRS:

See DESCENT AND DISTRIBUTION.

HIGHWAYS:

Prescriptive right of public to waters for use in watering trough in highway, see WATERS AND WATER COURSES, 1.

1. HIGHWAYS—COLLISION—AUTOMOBILE AND BICYCLE — NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. The negligence of the driver of an automobile in colliding with the plaintiff riding a bicycle, and the contributory negligence of the plaintiff, are questions for the jury, where it appears that, after each had observed the other, several hundred feet away, the plaintiff, without watching, crossed the road ahead of the automobile approaching at the rate of 15 or 20 miles an hour, and was clear of the roadway when struck, and that, with plaintiff in full view, the automobile approached with undiminished speed without warning or signal and left the road where it collided with the plaintiff, probably because the driver "got rattled," and the collision would not have happened if the automobile had kept its course in the road. *Tschirley v. Lambert* 72

HOMICIDE:

1. HOMICIDE—PREMEDITATION AND MALICE—JUSTIFICATION — EVIDENCE—QUESTION FOR JURY. In a prosecution for homicide, the questions of malice and premeditation and justification are for the jury, where it appears that defendant and deceased had quarreled the day before over an obstruction in the road, that defendant admitted that he shot the deceased, whose body shortly after the shooting was found in a large pool of blood near his hat in the road, and that some ninety-six steps away was an empty cartridge, and the tracks of three persons lead away therefrom, but no footprints were found near the body, and the defendant and the two other witnesses testi-

HOMICIDE—Continued.

fled that deceased attacked them in a threatening manner as though about to draw a pistol, when defendant shot twice, and that after the second shot the deceased turned and walked away out of sight and they did not know that he was mortally wounded. *State v. Drummond*..... 260

2. Homicide — Justification — Reduction of Degrees — Burden of Proof. The killing being admitted, the burden of proving justification or reducing the crime to manslaughter is upon the defendant. *State v. Drummond*..... 260

3. Homicide—Evidence—Admissibility. In a homicide case, the shirt worn by the deceased at the time he was shot, in the same condition as when removed from the body, is admissible in evidence. *State v. Drummond*..... 260

4. Same—Expert Evidence. In a homicide case, where defendant claimed that deceased attacked him and walked away after being shot, the evidence of a physician describing the wound in detail and stating his opinion as to how far deceased could have walked after receiving it, is admissible. *State v. Drummond*..... 260

5. Homicide—Premeditation and Malice—Evidence—Instructions. It not being necessary that there be direct and positive evidence of premeditation or malice, instructions thereon are properly given if those elements could be inferred from the circumstances proven. *State v. Drummond*..... 260

HUSBAND AND WIFE:

See Divorce, Marriage.
Conveyances between, see Fraudulent Conveyances.
Vacation of judgment against husband on community debt for failure to join wife as party, see Judgment 3.

1. Husband and Wife — Alienation of Affections — Evidence — Wealth of Defendant—Damages. Punitive damages not being recoverable in this state, in an action for alienation of a husband's affections, evidence that defendant frequently spoke to plaintiff's husband of defendant's great wealth, is inadmissible, where there was no evidence that she held out her wealth as an inducement for the husband to divorce the plaintiff and marry her, or tending to connect such evidence with other matters causing the alienation. *Phillips v. Thomas*..... 533

2. Husband and Wife — Alienation of Affections — Damages — Mitigation. In an action for alienation of affections, the fact that the husband and wife had been living separate and apart for three years, and had little affection for one another, may be shown in mitigation of damages. *Phillips v. Thomas*..... 533

HUSBAND AND WIFE—CONTINUED.

3. SAME—ALIENATION OF AFFECTIONS — DAMAGES — EXCESSIVE VERDICT. A verdict for $35,000 for alienation of a husband's affections, reduced by the trial court to $25,000, is still so excessive and unreasonable as to raise a presumption of passion and prejudice, requiring a new trial, where the parties were past middle life, had been living separate and apart for three years, and had little affection for one another. *Phillips v. Thomas*..... 533

4. HUSBAND AND WIFE—COMMUNITY PROPERTY—CONVEYANCE TO WIFE —FORM. Where the husband had charge of a transaction whereby property was conveyed to the wife, as and for her sole and separate property, the form of the deed is binding upon him, and the property becomes her separate property. *In re Tresidder's Estate*... 15

5. HUSBAND AND WIFE—VOID MARRIAGE—COMMUNITY PROPERTY. A marriage between parties prohibited from contracting the marriage is void *ab initio*, and property acquired cannot be community property. *Sortore v. Sortore*..... 410

IMPEACHMENT:

Of witness, see WITNESSES.

IMPROVEMENTS:

Public improvements, see MUNICIPAL CORPORATIONS, 2, 13-15, 17-26, 32-35.

INDEMNITY:

See GUARANTY; REPLEVIN.

Right of officer to demand bond before levy on personal property, see SHERIFFS AND CONSTABLES.

INDEMNITY INSURANCE:

See INSURANCE.

INFANTS:

Liability of county for costs in proceedings against delinquent in juvenile court, see COSTS, 1.

1. INFANTS—DELINQUENT CHILDREN—PROCEEDINGS—COSTS—RIGHT TO. Costs cannot be allowed in a proceeding against a delinquent child and her parent contributing to the delinquency, entitled "In re the welfare of R;" as they are not authorized by Rem. & Bal. Code, § 491, authorizing costs in all actions prosecuted in the name and for the use of the state or county; nor by virtue of Id., § 2225, authorizing costs in proceedings before a committing magistrate; nor by the statutes giving every person accused of crime the right to the compulsory attendance of witnesses. *Pierce County v. Magnuson*..... 639

INHERITANCE:

See DESCENT AND DISTRIBUTION.

INITIATIVE AND REFERENDUM:

Amendment of city ordinance and charter, see MUNICIPAL CORPORATIONS, 7-12.

INJUNCTION:

Injunction bonds, see BONDS.
Restraining auditor from placing name of candidate on ballot, see ELECTIONS, 3.
Conclusiveness of matters on former appeal in action on bond given in former action, see JUDGMENT, 4.
Pleading in action on injunction bond, see PLEADING, 3.
Enjoining trespass on right of way, see RAILROADS, 2.

1. INJUNCTION—WHEN LIES—TO PREVENT TRESPASS—ADEQUATE REMEDY AT LAW—FORCIBLE ENTRY AND DETAINER. Injunction will not lie to restrain a trespass upon lands by persons who were tenants at will, under claim of entry and possession with the knowledge and consent of the plaintiffs; since the plaintiffs have an adequate remedy by action of forcible entry and detainer. *Cogswell v. Cogswell* 184

2. SAME—MULTIPLICITY OF SUITS. Injunction to restrain trespass does not lie on the ground of preventing a multiplicity of suits, where there is but one trespass by one and the same person claiming the right to possession. *Cogswell v. Cogswell*..... 184

INSANE PERSONS:

Testamentary capacity, see WILLS, 5.

INSTRUCTIONS:

As law of case, see APPEAL AND ERROR, 34.
Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 35-39.
In criminal prosecutions, see HOMICIDE, 5.
Failure to give as ground for new trial, see NEW TRIAL, 1.
In civil actions, see TRIAL, 4.

INSURANCE:

1. INSURANCE—INDEMNITY INSURANCE — CONTRACT — CONSTRUCTION — ASSUMPTION OF DEFENSE—LIABILITY. A policy of indemnity insurance indemnifying an employer against loss "actually sustained and paid in money by him after actual trial of the issue," indemnifies against loss only and not against liability, and is not enlarged by stipulations reserving to the company the right to defend the suit and the fact that the company assumed the defense. *Ford v. Aetna Life Ins. Co*..... 29

INTEREST:

Rate of in mortgage note, construction, see BILLS AND NOTES, 2.
On taxes paid upon redemption from illegal execution sale, see JUDICIAL SALES, 3.
Abatement of interest on mortgage note, see MORTGAGES, 2.
Increased interest after default in payment of installments, see MORTGAGES, 3.
On bonds issued by port district, see MUNICIPAL CORPORATIONS, 36.
Allowance on foreclosure of liens for cost of filling state tide lands, see PUBLIC LANDS, 8.

INTERROGATORIES:

To witnesses, see DEPOSITIONS, 1.
To jury, see TRIAL, 5.

INTOXICATING LIQUORS:

1. INTOXICATING LIQUORS — LOCAL OPTION — ELECTIONS — "GENERAL ELECTION"—STATUTES—CONSTRUCTION. Under the local option law by which the legislature intended to allow an immediate election if the people of any unit desired it, and thereafter an election should be had only at a general county or state election, a city election is a "general election" within the meaning of § 3 (Rem. & Bal. Code, § 6294), providing that the petition for an election in a local unit shall be signed by qualified electors equal in number to thirty per cent of the electors voting at the "last general election within such unit;" especially in view of the history of the passage of the act showing that the several possible times for general elections were considered, and the last election preceding the regular biennial election was adopted, as giving the fairest index of the number of voters who will exercise the franchise. *State ex rel. Griffin v. Superior Court*..... 545

2. INTOXICATING LIQUORS — LOCAL OPTION — ELECTIONS — STATUTES — CONSTRUCTION. A city election for the purpose of electing city officers to carry out the change to a commission form of government is a "general election," within the local option law, Rem. & Bal. Code, § 6294, providing that the petition for an election in a local unit shall be signed by qualified electors equal in number to thirty per cent of the electors voting at the "last general election within such unit." *State ex rel. Forgues v. Superior Court*..... 670

3. INTOXICATING LIQUORS—LOCAL OPTION ELECTION—PETITION. Rem. & Bal. Code, § 6294, requiring a petition for a local option election to designate the name of the precinct in which the petitioners reside, their post office address and their street and house number, if any, is substantially complied with by giving the name of the town as their post office address, without specifying any precinct, street or house number, where there was only one voting precinct in the town, and the houses were not numbered. *State ex rel. Quillen v. Superior Court*..... 343

INTOXICATING LIQUORS—CONTINUED.

4. INTOXICATING LIQUORS — LOCAL OPTION — PETITION FOR ELECTION — SIGNERS—REQUISITES. The local option law, Rem. & Bal. Code, § 6294, requiring signers of the petition to give the "street and house number, if any, of his residence," and providing that no signature shall be valid unless the requirement is complied with, is mandatory and a signature to the petition failing to give the street and house number, if any, is invalid and cannot be counted in determining whether sufficient electors have signed the petition. *State ex rel. Czerny v. Superior Court*..... 592

5. SAME. The local option law, Rem. & Bal. Code, § 6294, providing that every signer of the petition in a city, as distinguished from a town, shall give his "street and house number, if any, of his residence," requires him to give his street, if any, although he has no house number. *State ex rel. Czerny v. Superior Court*..... 592

6. INTOXICATING LIQUORS—OFFENSES—ILLEGAL SALES — LOCAL OPTION LAW — SALE AND DELIVERY AT BREWERY — STATUTES — CONSTRUCTION. A brewery in a no-license unit is not authorized to make a delivery of a case of bottled beer at its brewery to a person calling there for it, by Rem. & Bal. Code, § 6309, providing that the local option law shall not apply in no-license units to shipments or deliveries of unbroken packages at residences which are not places of business or of public resort, by manufacturers or wholesalers in their own conveyances, by common carrier or otherwise, and providing that the act shall not prohibit the manufacture from raw material "nor the delivery of the same." *State v. Bellingham Bay Brewery*..... 650

7. INTOXICATING LIQUORS—OFFENSES—ILLEGAL SALES—LOCAL OPTION—SALES BY MANUFACTURERS—STATUTES—CONSTRUCTION. The local option law, Rem. & Bal. Code, § 6309, which permits the manufacturers or wholesalers in a no-license unit to make shipments or deliveries in their own conveyances of unbroken packages to patrons at private residences, does not permit the manufacturer to make sales in a no-license unit; in view of the restrictions in the act against all sales in such units. *State v. Bellingham Bay Brewery*..... 654

IRRIGATION:

Appropriation of waters for, see NAVIGABLE WATERS.
Use of waters for, see WATERS AND WATER COURSES, 2-5, 9, 10.

JUDGES:

Irregularities or improper conduct of election judges, see ELECTIONS, 6.
Change of venue for prejudice of, see VENUE.

1. JUDGES — ELIGIBILITY TO OTHER OFFICE — CONSTITUTIONAL PROVISIONS. Under Const., art. 4, § 5, providing that the judges of the supreme and superior courts shall be ineligible to any other office or public employment than a judicial office or employment during the

JUDGES—CONTINUED.

term for which they shall be elected, a judge elected for the term of four years is ineligible as a candidate for governor during such period, although his term as judge would expire before the term of governor commences; "eligible" meaning competent to be chosen, and having reference to the time the choice is made, without reference to the time when the term begins. *State ex rel. Reynolds v. Howell*. 467

2. JUDGES — ORDERS OUTSIDE COUNTY — TRIAL. Under Rem. & Bal. Code, § 42, a judge having heard a cause out of his district may decide and rule thereon in any other county in the state. *Rice v. Ahlman*..... 6

JUDGMENT:

Review, see APPEAL AND ERROR.
Entry and finality of, see APPEAL AND ERROR, 7.
Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 26.
For enforcement of mechanics' lien, see MECHANICS' LIENS, 1.

1. JUDGMENT — VACATION — SECOND JUDGMENT. After entry of final judgment in a cause, the court is without power to enter another, until the first is regularly canceled or set aside; and the first judgment is not vacated by a second judgment making no mention of the first. *Wagner v. Northern Life Ins. Co*..... 210

2. JUDGMENT—VACATION—ARBITRATION AND AWARD. The failure of arbitrators to determine all the questions involved, is error of law, that can be corrected only by appeal from the judgment, and not by motion to vacate the judgment. *McElroy v. Hooper*..... 347

3. JUDGMENT—VACATION—HUSBAND AND WIFE. The fact that the wife was not a party to a judgment against a husband on a community debt, and that the same may be enforced against community property, is not ground for vacating the judgment. *McElroy v. Hooper*... 347

4. JUDGMENT—RES JUDICATA—PARTIES—BONDS—SURETIES ON BOND OF PARTY. Matters determined on a former appeal are *res judicata* in an action by defendants against the plaintiffs and their surety on an injunction bond given in the former action. *Mead v. Kalberg*.... 517

5. JUDGMENT—BAR—RES JUDICATA — PARTIES CONCLUDED — CASES OF GENERAL INTEREST. A judgment sustaining a demurrer and dismissing an action brought by a citizen and taxpayer against a city clerk to enjoin the holding of a local option election on the ground that the petition therefor was insufficient, is *res judicata* and a bar to a similar action brought for the same purpose by another citizen and taxpayer alleging his special interest as a retail liquor dealer, where it is not shown that the former suit was fictitious or collusive. *State ex rel. Forgues v. Superior Court*..... 670

JUDGMENT—CONTINUED.

6. JUDGMENT—LIEN—WHEN ATTACHES — PRIORITY OVER SUBSEQUENT CONVEYANCES. The lien of a judgment attaches from the date of entry, notwithstanding the pendency of a motion for a new trial; and the lien cannot thereafter be impaired by a voluntary conveyance by the judgment debtors, nor the title acquired under execution sale questioned by vendees of the judgment creditors who had notice of the judgment and failed to redeem. *Konnerup v. Milspaugh*.... 415

7. JUDGMENT—STAY—MOTION NON OBSTANTE VEREDICTO. A motion for judgment *non obstante veredicto* does not operate as a stay preventing the entry of a judgment, when it was not treated or considered as a motion for a new trial. *Wagner v. Northern Life Ins. Co*..... 210

JUDICIAL NOTICE:

In civil actions, see EVIDENCE, 1.

JUDICIAL SALES:

As within statute of frauds, see FRAUDS, STATUTE OF, 3.

1. JUDICIAL SALES—SALE TO OFFICER — VALIDITY — CONFIRMATION OF SALE—EFFECT. An execution sale by a sheriff to himself is such a fraud on the rights of the owner as to be voidable if challenged within a reasonable time by a suit to redeem the property, notwithstanding the confirmation of the sale, which only cures irregularities that go to the record, and does not bar a suit by one who was defrauded. *Miller v. Winslow*..... 401

2. JUDICIAL SALES—VALIDITY—SALE TO OFFICER—FRAUD—INADEQUACY OF PRICE. Where an execution sale by a sheriff to himself deters another purchaser from bidding, the sale operated as a direct fraud upon the owner, especially where there was a great inadequacy of price; and it is immaterial that the sheriff finally allowed the property to go to the other bidder. *Miller v. Winslow*..... 401

3. JUDICIAL SALES — ILLEGAL SALE — REDEMPTION — RIGHTS OF PURCHASER—INTEREST ON TAXES PAID—RATE. Upon redemption from an illegal execution sale, the purchaser is not entitled to fifteen per cent interest upon taxes and assessments paid on the property, but only interest at the legal rate. *Miller v. Winslow*..... 401

4. JUDICIAL SALES—BIDS—JURISDICTION OVER PURCHASER. The purchaser at a receiver's sale made under order of court submits himself to the jurisdiction of the court, and may be compelled to comply with his bid by rule in the original case. *Rice v. Ahlman*..... 12

JURISDICTION:

Particular courts, see COURTS, 2.

To make allowances for widow's support, see EXECUTORS AND ADMINISTRATORS, 3.

Over purchaser at receiver's sale, see JUDICIAL SALES, 4.

JURISDICTION—CONTINUED.

Notice to confer jurisdiction to make assessment for public improvement, see MUNICIPAL CORPORATIONS, 26, 27.
To determine place of trial, see VENUE.
Of court to determine rights of company under franchise, see WATERS AND WATER COURSES, 8.

JURY:

Questions for jury in civil actions, see TRIAL, 1.
Verdict in civil actions, see TRIAL, 3.
Instructions in civil actions, see TRIAL, 4.

1. JURY—RIGHT TO JURY TRIAL—LEGAL ISSUES IN EQUITABLE ACTION. In an action to foreclose a subcontractor's lien, a defendant is not entitled to a jury trial of the legal issues arising between the defendants; since equity, having obtained jurisdiction, retains it to the end. *Maher & Co. v. Farnandis*..... 250

JUSTIFICATION:

Of homicide, see HOMICIDE, 1, 2.

KNOWLEDGE:

As affecting assumption of risks by servant, see MASTER AND SERVANT, 6.

LAKES:

Appropriation of waters for irrigation, see NAVIGABLE WATERS.

LANDLORD AND TENANT:

Oral modification of written lease, see FRAUDS, STATUTE OF, 4.
Lease of public structures by port district, see MUNICIPAL CORPORATIONS, 34.

1. LANDLORD AND TENANT—LEASE—CONSTRUCTION. Where an amusement company leased a portion of its premises, described as five certain lots, for the purpose of an amusement park, the lessee agreeing to pay as rent a percentage of the gate receipts, and not to conduct any bathing establishment, cafe, restaurant or skating rink on the leased premises, and for a time all the property was included within a common inclosure, and the lessor conducted a bathing establishment, cafe, and skating rink on property reserved and not mentioned in the lease, a clause in the lease that the whole of said "eight lots" shall be open to the public upon the payment of a general admission, is meaningless, and the covenants of the lease can refer only to the five lots described; hence the lessee has no right to control the admission to or the nature of amusements conducted on the lessor's portion of the premises reserved from the lease, and an injunction will therefore not lie to close the lessor's public entrances to the common inclosure and forbidding the lessor to call attention to his free entrances to the grounds; the lessee's remedy

LANDLORD AND TENANT—CONTINUED.

being to inclose his own portion of the premises, or by a suit to reform the lease, if it does not express the agreement of the parties. *Looff v. Seattle Park Co.*..... 363

2. SAME—CONSTRUCTION BY PARTIES. In such a case, the fact that for several years the only public entrance to the grounds was in charge of the lessee during the summer months while his amusement park was in operation, and that the lessor conducted no amusements on its property other than those prohibited to the lessee, does not aid the construction of the writings, when their subject-matter does not cover the lessor's reserved property, and where the subsequent conduct of the parties may have been the result of independent agreements. *Looff v. Seattle Park Co.*..... 363

3. LANDLORD AND TENANT—BREACH OF COVENANT—MEASURE OF DAMAGES. Under a lease of rooms to be sublet for furnished lodgings, the measure of damages for breach of the lessor's covenant to furnish heat is the difference between the value of the use of the rooms as furnished by the lessee and heated as contemplated by the contract, and the value of the use as in fact heated by the lessor. *Purcell v. Warburton*..... 129

4. LANDLORD AND TENANT—BREACH OF COVENANT—EVIDENCE—INSTRUCTIONS. In an action for breach of a covenant in a lease to furnish heat for rooms to be sublet for lodgings, evidence to show that lodgers suffered discomfort and illness by reason of failure to properly heat the rooms is relevant, where proper instructions on the measure of damages eliminated all elements of damages suffered by the lodgers. *Purcell v. Warburton*..... 129

5. SAME—INSTRUCTIONS. In such case, refusal to instruct that there could be no recovery if the rooms were kept as full as when properly heated, is harmless. *Purcell v. Warburton*..... 129

6. LANDLORD AND TENANT — ACTION FOR RENTS — MODIFICATION OF LEASE—EVIDENCE—SUFFICIENCY. A finding that a lease was modified by an oral agreement to allow the lessee to pay rent to a third party, and to remain in possession without payment of rent pending the termination of litigation between the lessor and the third party, will not be disturbed where the evidence is conflicting and the lessee was corroborated by the fact that the lessor continuously refrained from demanding and collecting the rentals, which were paid to the third party, and that the litigation had not been finally determined. *Oregon and Washington R. Co. v. Elliott Bay Mill & Lumber Co.* 148

LANDS:

See PUBLIC LANDS.

LAW OF THE CASE:

See APPEAL AND ERROR, 34, 40.

LEASES:

See LANDLORD AND TENANT.

LEGISLATIVE POWER:

See MUNICIPAL CORPORATIONS, 1.

LEVY:

Of tax to pay interest and bonds, see MUNICIPAL CORPORATIONS, 15.
Of assessment for street improvement, see MUNICIPAL CORPORATIONS, 24.
Of taxes, see TAXATION.

LICENSES:

Dissolution of corporation for nonpayment of, see CORPORATIONS, 9, 10.

LIENS:

See MECHANICS' LIENS.
Judgment, see JUDGMENT, 7.
For cost of filling tide lands, see PUBLIC LANDS, 2, 3, 6-7.

LIMITATION:

Of municipal indebtedness, see MUNICIPAL CORPORATIONS, 30-32.

LIMITATION OF ACTIONS:

1. LIMITATION OF ACTIONS — DISABILITIES — MENTAL CAPACITY — EVIDENCE — SUFFICIENCY — WILLS — CONTEST. There is not sufficient evidence of insanity or incapability of understanding one's legal right so as to toll the statute of limitations, respecting the institution of a will contest, where it merely appears that a man, seventy years of age, retired from active business after meeting with an accident affecting one of his legs, which, with his corpulence, prevented his walking or getting around, and that he believed in spiritualism, and manifested deeply-felt religion by Bible reading, prayer, and singing; while other evidence showed that he retained control of his affairs and had no infirmity of mind. *In re Siebs' Estate*..... 374

LOAN OF CREDIT:

Acquiring terminal properties by port district as loan of credit to individual, see MUNICIPAL CORPORATIONS, 34.

LOCAL OPTION:

See INTOXICATING LIQUORS.

LOCATION:

Of lost corner, see BOUNDARIES.
Of railroad line, see STIPULATIONS, 2, 3.

LOST INSTRUMENTS:

Wills, see WILLS, 6.

MACHINERY:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 1, 10, 13.

MALICE:

See HOMICIDE, 1, 5.

MANDAMUS:

Supersedeas on appeal from judgment, see APPEAL AND ERROR, 8, 9.
To state officer, see COURTS, 2.

MANSLAUGHTER:

See HOMICIDE, 2.

MANUFACTURERS:

Sales of liquor by in dry unit, see INTOXICATING LIQUORS, 6, 7.

MARRIAGE:

See DIVORCE; HUSBAND AND WIFE.

1. MARRIAGE—ANNULMENT. Under Rem. & Bal. Code, § 983, providing that when there is doubt as to the validity of a marriage either party may apply for a decree of nullity, a divorced woman who remarries within six months, while incapacitated, may maintain the action where she did not know that the marriage was illegal, and was less in the wrong than the husband, who knew the facts as to the divorce. *Sortore v. Sortore*..... 410

2. MARRIAGE—ANNULMENT—DISPOSITION OF PROPERTY. Upon the annulment of a void marriage, it is not an abuse of discretion to award to the plaintiff property which belonged to her prior to marriage, and upon which she had paid all taxes, where the improvements placed thereon by the defendant added little to its value, and he was paid for the greater part of his work, and had abused the plaintiff and failed to properly provide for her. *Sortore v. Sortore*..... 410

MASS CONVENTION:

Legality of mass convention outside county, see ELECTIONS, 2.

MASTER AND SERVANT:

Indemnity insurance, see INSURANCE.
Liens for labor and materials, see MECHANICS' LIENS.

1. MASTER AND SERVANT—SAFE PLACE—GUARDING MACHINERY UNDER FACTORY ACT—NOTICE OF ACCIDENT—SUFFICIENCY—CORPORATIONS—DISSOLUTION. An employee's notice of an accident by reason of the unguarded condition of a saw, required by the factory act, Rem. & Bal. Code, § 6595, to be given the employer, is sufficient if given to a corporation that had been dissolved by the secretary of state for nonpayment of its license fees, where it was at the time believed

MASTER AND SERVANT—CONTINUED.

by all parties that the corporation had an existence and its mill was being operated in its name by its trustees who received the notice. *Jones v. Francis*..... 676

2. MASTER AND SERVANT—FELLOW SERVANTS—TRANSMITTING SIGNALS. Where the head loader in loading logs on cars with a donkey engine usually gave the signals for the engineer to start the engine, but in case he could not see the engineer, he transmitted the signals through the second loader, the two are fellow servants, and recovery cannot be had for the death of the head loader through negligence of the other in signaling the engineer to start while the deceased was in a place of danger. *Drewcaneak v. Walville Lumber Co.*..... 257

3. MASTER AND SERVANT—FELLOW SERVANTS—SAFE WORKING PLACE—VICE PRINCIPALS. An engineer of a donkey engine, and his fireman working under his control in repair work on the engine, are not fellow servants, with reference to the engineer's duty to make the working place safe by closing the globe valve of the engine so as to prevent its starting by accidental contact with the throttle lever while working at the repairs; since the same was a nondelegable duty of the master, making the engineer a vice principal with respect thereto. *Lackey v. Big Creek Timber Co.* 619

4. MASTER AND SERVANT—NEGLIGENCE—INCOMPETENT FELLOW SERVANTS—EVIDENCE—SUFFICIENCY. In an action for injuries sustained when a stone moved by a derrick struck one of the men, it is not sufficient evidence that the derrickman was incompetent that he had worked as a derrickman on this job but two days, and that a short time before, when a stone struck the car, the superintendent had rebuked the gang and instructed the derrickman. *Girocamo v. Tribble* 25

5. SAME—ASSUMPTION OF RISKS. In such case, the injured servant did not assume the risk of injury from such act of his fellow servant, for he was not informed that it was intended. *Stone v. Sylliaasen*..... 89

6. MASTER AND SERVANT—ASSUMPTION OF RISKS—SAFE PLACE—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A pitman in a steam shovel crew does not assume the risk of danger from rock falling down the slope, when the steam shovel was idle, if he was in a position where he could not see the danger, even though warned of danger by one fellow servant who was contradicted by another co-servant who sometimes directed the work, where there was evidence that the rock did not fall from the place where the work was being done, but from the side of the cut where the wall was completed from which rocks were not accustomed to fall; since the master is liable if he carelessly allowed the place to become unsafe without notice to the servant. *Barach v. Carlson*..... 124

MASTER AND SERVANT—CONTINUED.

7. SAME—ASSUMPTION OF RISKS—OBEDIENCE TO ORDERS. In such case, the servant does not assume the risks in obeying the order if the rope was not removed when he went into the place to work. *Meigs v. Porter*..... 164

8. SAME — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. In such case, the employee was not guilty of contributory negligence, as a matter of law, in not procuring a lantern before attempting to clear out the sawdust, or in using his hand instead of a scraper or shovel, where he did not know that the edger was in operation, the only light available was in use in another part of the mill, and the sawdust was so closely packed that he could not use the scraper with effect. *Stewart v. Bowen*..... 195

9. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE. In an action for personal injuries sustained by an employee in a mill when a slasher saw exploded, the plaintiff is shown to be guilty of contributory negligence precluding any recovery, where it appears that the saw was in good condition, that he fed the saw a slab in a slanting position, contrary to orders, knowing that it was liable to break the saw and thinking he would take the chance. *Smith v. Quinault Lumber Co*..... 328

10. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—METHODS OF WORK. An employee in a shingle mill is not guilty of contributory negligence, as a matter of law, where he was engaged in drawing a heavy shingle block to the bolter saw, with his back to the saw, when the picaroon slipped or drew out of the block through some unknown cause, causing him to fall against the saw, which was unguarded. *Jones v. Francis*..... 676

11. MASTER AND SERVANT—SAFE PLACE AND METHOD OF WORK—EVIDENCE—EXPERT OPINION—ADMISSIBILITY. Where a servant, assisting in removing false work, was not acquainted with the method of work or instructed how to do it, other than to hold one end of a plank while a fellow servant loosened the other end, and was injured when the fellow servant threw his end of the plank to the floor, the opinion of experts that the method and place of work were unsafe is admissible, where there was evidence that the fellow servant did not act negligently, but performed his work in the method theretofore adopted. *Stone v. Sylliaasen*..... 89

12. MASTER AND SERVANT—INJURIES TO SERVANT—SAFE PLACE—MINES—EVIDENCE—ADMISSIBILITY. In an action for the death of a coal miner poisoned by gases in a room on the 10th level on the west side of the mine, it is not error to admit evidence that the air was frequently bad on the 9th level on the east side of the mine, although that place was not in issue, where there was evidence that there was a passageway whereby the air could pass from the one place to the other, and where evidence of frequent bad air throughout the

MASTER AND SERVANT—CONTINUED.

mine also supported the allegation that the rules of the company were frequently violated by shooting blasts at the noon hour; especially where the court cautioned the jury that the general system of ventilation was not complained of as defective and that the only issue was as to insufficient ventilation of the particular room. *Delaski v. Northwestern Imp. Co.*..... 143

13. MASTER AND SERVANT — INJURY TO SERVANT — SAFE PLACE — UNGUARDED MACHINERY—EVIDENCE—SUFFICIENCY. In an action for injuries sustained by a night watchman in a mill, who was injured while reaching under an edger to clear out the sawdust, there was sufficient evidence of defendant's negligence, where it appears that the mill was insufficiently lighted, that the saws of the edger were left running when the machine was not in use, contrary to custom, and no warning thereof given to the plaintiff, who could not see that they were running or hear them, and that the saws were without guards underneath the table when they might have been easily and effectively guarded. *Stewart v. Bowen*..... 195

14. SAME—SAFE PLACE AND METHOD OF WORK—QUESTION FOR JURY. In such case, the negligence of the master in failing to provide a safe place or method of doing the work is for the jury. *Stone v. Sylliaasen*..... 89

15. MASTER AND SERVANT — INJURY TO SERVANT — NEGLIGENCE — SAFE PLACE—DUTY TO WARN—QUESTION FOR JURY. In ordering a servant into a dangerous place to remove a piece of iron suspending a heavy tank which was being lowered by a derrick to a car, the master owes the imperative duty to warn the servant of the removal of a rope holding the tank, rendering the work unnecessarily dangerous; and it was for the jury to determine whether the master was guilty of negligence in failing to keep the place safe, or give warning of impending danger by the removal of the rope, where the evidence was conflicting as to whether the servant had notice, and showed that no one would have been injured if the tank had been lowered by the rope after removal of the iron, as was the intention from the beginning. *Meigs v. Porter*..... 164

MEASURE OF DAMAGES:

See DAMAGES, 4.
For fraud in representing price paid for land, see FRAUD, 4.
For breach of covenant to furnish heat, see LANDLORD AND TENANT, 3.

MECHANICS' LIENS:

1. MECHANICS' LIENS—ACTION TO FORECLOSE—ISSUES—APPEAL—RIGHT TO ALLEGE ERROR. In an action to foreclose a subcontractor's lien for excavation work, in which plaintiff recovered judgment against another subcontractor, who in turn was given judgment against the principal contractor for any sum he might be compelled to pay on

MECHANICS' LIENS—CONTINUED.

plaintiff's judgment, the principal contractor cannot complain that plaintiff's judgment contained an item that was not lienable, the owner of the property and the subcontractor not having appealed. *Maher & Co. v. Farnandis*..... 250

2. SAME—ISSUES—PLEADING—CROSS-COMPLAINT AGAINST CODEFENDANT. In an action to foreclose a second subcontractor's lien for excavation work, in which the first subcontractor and the principal contractor are made defendants, the first subcontractor may cross-plead against the principal contractor and have legal relief on his contract, to avoid a multiplicity of suits, in view of Rem. & Bal. Code, § 406, providing that when the justice of the case requires it, the court may determine the ultimate rights of all the parties. *Maher & Co. v. Farnandis*. 250

MEMORANDA:

Required by statute of frauds, see FRAUDS, STATUTE OF.

MENTAL CAPACITY:

Effect on limitation in contest of will, see LIMITATION OF ACTIONS.
To execute will, see WILLS, 5.

MENTAL SUFFERING:

As element of damages, see DAMAGES, 2.

METHOD OF WORK:

See MASTER AND SERVANT, 10, 11, 14.

MINES AND MINERALS:

Employees in mines, see MASTER AND SERVANT, 12.

MINORS:

Allowance of costs in proceedings against delinquent child, see INFANTS.

MISREPRESENTATION:

See FRAUD.

MITIGATION:

Of damages, see DAMAGES, 3.
Of damages for alienation of affections, see HUSBAND AND WIFE, 2.

MODIFICATION:

Of judgment or order on appeal, see APPEAL AND ERROR, 41.
Parol modification of written contract, see EVIDENCE, 6.
Of written lease by partly performed oral agreement, see FRAUDS, STATUTE OF, 4.
Of lease, see LANDLORD AND TENANT, 6.

MONEY RECEIVED:

Recovery of price paid for land, see VENDOR AND PURCHASER.

MORTGAGES:

1. MORTGAGES—STIPULATIONS BY MORTGAGE—CONSTRUCTION — BREACH —DAMAGES. Where a purchase money mortgage upon high class business property, which was inaccessible because 80 to 90 feet above street grade, stipulated that the mortgagee should bring the property and part of the street down to the established grade within a specified time, the mortgagor, on breach of the stipulation by delay in performance, can recover the reasonable rental value of the property during the time which she was kept out of its use by reason of the delay; and a provision in the mortgage postponing the maturity of the note until the grading had been done does not show an intention to make that the measure of the mortgagee's liability for the breach of the stipulation, where a substantial part of the purchase price had already been paid. *Scandinavian American Bank v. Washington Hotel & Imp. Co.*..... 223

2. SAME—INTEREST—ABATEMENT. In such case, the interest on the mortgage note does not abate from the date of its maturity until the grading was completed, where the note by its terms bears interest "until paid," and the mortgage stipulates that it shall not be due and payable until the grading is completed, and the contract contemplates that the mortgagee shall reduce the property to grade and have its value as fixed by the contract. *Scandinavian American Bank v. Washington Hotel & Imp. Co.*..... 223

3. MORTGAGES—STIPULATIONS—INCREASED INTEREST AFTER DEFAULT—CONSTRUCTION. A stipulation in a mortgage providing for interest at the rate of 12 per cent upon all remaining unpaid installments, if default be made in the payment of any installment of principal and interest upon the day it becomes due, provides for interest at such increased rate from the date of the default, and not from the date of the note. *Equitable Sav. & Loan Ass'n v. Bowes*..... 169

4. MORTGAGES—FORECLOSURE—ATTORNEY'S FEES — REASONABLENESS — ESTOPPEL. Under Rem. & Bal. Code, § 475, limiting the amount which a mortgagee may collect as an attorney's fee to a reasonable sum, the mortgagee, on collecting a fee, is estopped to assert as against his attorney, that the sum collected was unreasonable. *Thayer v. Harbican*..... 278

5. MORTGAGES—FORECLOSURE — COSTS — ATTORNEY'S FEES — TENDER—EFFECT. Where defendant's tender of the amount due on a promissory note and mortgage was sufficient when made, the plaintiff is not entitled to an allowance for attorney's fees. *Scandinavian American Bank v. Washington Hotel & Imp. Co.*..... 223

MOTIONS:

To suppress deposition, see DEPOSITIONS, 5.

MULTIPLICITY OF SUITS:

Avoidance by injunction, see INJUNCTION, 2.

MUNICIPAL CORPORATIONS:

Street railroads, see STREET RAILROADS.

Water supply, service to consumers, see WATERS AND WATER COURSES, 6-8.

1. MUNICIPAL CORPORATIONS—CREATION — PORT DISTRICTS — CONSTITUTIONAL LAW—INHERENT LEGISLATIVE POWERS. The port district act, Laws 1911, p. 412, authorizing the creation of port districts as municipal corporations, is not unconstitutional as creating municipal corporations not recognized by the constitution, there being no express constitutional prohibition against the creation of municipal corporations other than counties, cities, towns and school districts specifically named in the constitution, and the creation of municipal corporations being an inherent legislative power without express authority therefor; especially in view of the fact that the constitutional provisions respecting counties, cities, towns and school districts only regulate and do not expressly authorize their creation, and in view of Const., art. 8, § 6, referring to "other municipal corporations" than those specially mentioned. *Paine v. Port of Seattle* 294

2. SAME—CREATION OF PORT DISTRICTS—CONSTITUTIONALITY OF ACT—PARTIAL VALIDITY—ACTION—PLEADING—COMPLAINT. The port district act, Laws 1911, p. 412, authorizing the creation of port districts with power to make harbor improvements coincident or concurrent, to some extent, with the powers of counties and cities, is not void in its entirety from the mere fact that the port district may, in whole or in part, occupy the same territory as, and be superimposed upon another municipal corporation or corporations limited by the constitution in the amount of the expenditures that may be incurred for improvements of the same nature; and a complaint questioning the validity of a port district and its proposed indebtedness is insufficient where it does not appear that the indebtedness proposed would, with the existing indebtedness of the other municipality, exceed the constitutional limit. *Paine v. Port of Seattle*..... 294

3. MUNICIPAL CORPORATIONS—CREATION OF PORT DISTRICT — ELECTION—VALIDITY—DESIGNATION OF POLLING PLACE—NOTICE. A port district election is not invalidated by the failure to show that county commissioners designated the polling places "by resolution," where it appears that the clerk of the board made arrangements for the polling places, the board allowed and paid rent therefor, and a fair expression of the wishes of the voters was not interfered with; nor by the fact that no notice of the polling places was given, when the statute did not require notice, and there was no claim of fraud or unfairness. *Paine v. Port of Seattle*..... 294

4. SAME—NOTICE OF REGISTRATION. Irregularity in a port district election in that in a few small towns no notice of opening the registration polls was given as required by Rem. & Bal. Code, § 4765, does not invalidate the election, where it appears that all but a few hun-

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dred voters in such town voted, and the vote carried by a majority of over nine thousand. *Paine v. Port of Seattle*..... 294

5. SAME—BALLOTS—FORM. A port district election is not invalidated by the failure of the ballots to conform strictly to the expressions prescribed by law, and the fact that they contained other matter, where the matter was explanatory and did not mislead, but rendered the question submitted clear and certain. *Paine v. Port of Seattle* 294

6. SAME—CANVASS OF RETURNS. A port district election is not invalidated by an irregularity in the canvassing of the votes, the canvass being made by the general election board instead of the county commissioners as required by the port district act, in the absence of an allegation that the canvass made was incorrect and changed the result. *Paine v. Port of Seattle*..... 294

7. MUNICIPAL CORPORATIONS—ORDINANCES — AMENDMENT — INITIATIVE POWER—PETITION — CONSIDERATION — PRESUMPTIONS. Under a city charter providing that the city clerk shall file and present to the city council an initiative petition by 15 per cent of the electors, and that the city council shall, within ten days, either pass the ordinance without alteration or submit it to popular vote, the petition will be held *prima facie* sufficient, where the council delayed all action and there is no affirmative showing that it considered or rejected the petition on the ground of insufficiency. *State ex rel. Hindley v. Superior Court* 352

8. MUNICIPAL CORPORATIONS—CHARTERS—AMENDMENTS—ELECTIONS—GENERAL OR SPECIAL. Const., art. 11, § 10, providing that a city charter "may" be amended by proposals therefor submitted to the electors at "any general election," does not exclude other methods; hence, under the constitutional authority to cities of the first class to adopt special charters not "inconsistent" with the constitution and laws, a city may provide for proposed amendments to its special charter to be submitted to the electors at a special election. *State ex rel. Hindley v. Superior Court*..... 352

9. SAME—CHARTERS—SCOPE OF AMENDMENTS. Amendments to a special charter of a city of the first class that may be submitted at a special election are not confined to those that are only revisory or supplemental, but include those which alter or annul the basic principle upon which the city government is founded. *State ex rel. Hindley v. Superior Court*..... 352

10. SAME—SCOPE—STATUTES—AS "NOW" PROVIDED. A provision in a city charter authorizing the city to submit the matter of proposed amendments to the electors in the manner "as now provided," refers to the charter at the time the amendment is proposed, and not to the time when the law was passed. *State ex rel. Hindley v. Superior Court*..... 352

MUNICIPAL CORPORATIONS—CONTINUED.

11. SAME—SUBMISSION TO VOTERS—WARDS—PROCEEDINGS. A proposed amendment to a city charter is not sufficient in that it requires the election of aldermen by wards when there are at present no wards in the city; that being a mere detail for which the city council can provide. *State ex rel. Hindley v. Superior Court*..... 352

12. SAME—AMENDMENTS TO CHARTER—INITIATIVE PETITION—SIGNATURES—WITHDRAWAL. The right to withdraw a signature from an initiative petition is a personal one to the signer, and cannot be exercised by one who circulated the petition. *State ex rel. Hindley v. Superior Court*..... 352

13. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—WATER SUPPLY—SUBMISSION TO VOTERS. Under Laws 1901, page 177, providing that the council shall by ordinance submit to the voters any plan for providing the town with water works, no expenditures for a municipal water supply can be incurred until the plan has been submitted to and received the assent of the voters of the town, whether the sum be within or without the first constitutional limit of indebtedness; and the legislature had power to so provide. *State ex rel. Craig v. Newport*..... 286

14. SAME—PUBLIC IMPROVEMENTS—SUBMISSION TO VOTERS—PLANS ADOPTED—SUFFICIENCY. Laws 1911, p. 423, § 9, requiring the port commission to adopt detailed plans and an estimate of the expense of the proposed improvement and submit the same to the voters, as a prerequisite to the incurring of indebtedness, is satisfied by the adoption of plans that fairly inform the voters of the nature and extent of the proposed improvement, and it is not essential that plans be adopted in such detail as necessary for the final construction of the improvement. *Paine v. Port of Seattle*..... 294

15. SAME—PUBLIC IMPROVEMENTS—SUBMISSION TO VOTERS—RESOLUTION—LEVY OF TAX. A resolution of a port district commission for the issuance and sale of bonds, providing that the net income shall be applied to the payment of principal and interest on the bonds from year to year, and a tax levied annually for support to pay the balance of the interest and bonds annually maturing, does not constitute the levy of a tax, but is nothing more than a pledge that the tax will be levied to make up any deficiency in the income. *Paine v. Port of Seattle*..... 294

16. SAME—ULTRA VIRES CONTRACT—RATIFICATION—ESTOPPEL. Where the town authorities had no authority to provide for a municipal water supply without submitting the plan to the electors, their action in leasing springs for that purpose without submitting the matter to a vote is *ultra vires*, and acceptance of benefits under the contract is not a ratification which would estop the city from disputing the indebtedness unlawfully incurred. *State ex rel. Craig v. Newport* 286

MUNICIPAL CORPORATIONS—CONTINUED.

17. MUNICIPAL CORPORATIONS—PUBLIC WORKS — CONTRACT — EXTRAS—CONSTRUCTION AND OPERATION. In a contract for the construction of a concrete lining for a city reservoir, the contractor cannot recover for redressing the bottom, as an extra, where the work consisted largely of excavation, and no redressing was necessary when the contract was let, but became so by the action of the elements, and the contract provided that no claim for extras should be made for losses or damages arising from the action of the elements, and required the contractor to make such excavation as may be necessary to bring the surface to a true form and grade, to be paid for by the cubic yard as excavation, and not as redressing. *International Contract Co. v. Seattle*..... 504

18. SAME—EXTRAS — SUPPLEMENTAL AGREEMENT — CONSTRUCTION AND OPERATION. Where a contract for the construction of a concrete lining for a city reservoir provided for redressing slopes only when necessary in the opinion of the city engineer, a supplemental agreement between the contractor and the city engineer by which the contractor was granted certain concessions, and redressing certain slopes was to be obviated by the filling of eroded gullies with concrete at a certain price, the supplemental agreement is a complete defense to a claim for extras in redressing the slopes, where the evidence failed to show that the city engineer had requested such redressing, but had insisted that the matter was covered by the supplemental agreement. *International Contract Co. v. Seattle*..... 504

19. SAME — EXTRAS — ALLOWANCE. In such case, extras cannot be allowed for excess concrete used in the sides of the slopes covered in the supplemental agreement; but should be allowed for excess concrete admittedly used in the bottom, which was not covered in the supplemental agreement. *International Contract Co. v. Seattle*.. 504

20. SAME. In such a case, extras cannot be allowed for concrete placed in the bottom of the reservoir in excess of the thickness required by the contract, where the matter was in controversy and the subject of negotiations, which resulted in the acceptance of a proposition whereby the contractor was to establish a new grade, estimated by his own engineer to make the concrete of a specified average thickness, with intent thereby to avoid the redressing of the bottom and to effect a change of thickness to compensate for unevenness of the bottom, and where the city engineer's acceptance was explained by a letter of his understanding that no extra charge for concrete should be made in case the change of grade (as estimated by the contractor's engineer) increased the thickness of the concrete, which letter the contractor acknowledged to be correct. *International Contract Co. v. Seattle*..... 504

21. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ACCEPTANCE OF WORK—CONCLUSIVENESS. The failure of a city contractor to pay into a local improvement fund the amount of fixed charges, and to mix

MUNICIPAL CORPORATIONS—CONTINUED.

concrete by hand, as required by his contract, will not prevent recovery for the work on completion of the same, where the city engineer who had supervision of the work permitted mixing by a machine, and the governing body authorized by the contract accepted the work when completed; such acceptance being conclusive and a valid waiver of strict compliance with the contract. *Morehouse v. Clerk of Edmonds*..... 152

22. SAME—ACCEPTANCE OF WORK. Acceptance of public work by a "street committee" of the city council, required by the contract, is dispensed with by an independent acceptance by the city council which created the committee. *Morehouse v. Clerk of Edmonds*.. 152

23. SAME—ACCEPTANCE—ENGINEER'S CERTIFICATE — WITHHOLDING. A city engineer, made by contract the judge of when the work is completed, cannot arbitrarily and capriciously refuse to accept a public improvement, or withhold his certificate because the contractor refused to bear the burden of the former's errors. *Morehouse v. Clerk of Edmonds*..... 152

24. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS— ASSESSMENTS—PROCEEDINGS. Where an act prescribing a method of levying special assessments provided (Rem. & Bal. Code, § 7873), that nothing in the act shall be construed to limit or repeal any existing powers of cities with reference to such improvements, a city was authorized, after the enactment of the law, to levy special assessments under the preexisting laws and ordinances of the city. *Olympia v. Turpin*..... 581

25. MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — CONTRACTS WITH OWNER—ULTRA VIRES. A city cannot contract with part of the property owners in a contemplated improvement district to form the district and eliminate their property from assessment in consideration of their doing the necessary grading of certain streets, accepting a nominal sum as damages for their property taken or damaged by street extensions and changes of grade in the district; such contract being *ultra vires* and void. *Turner Investment Co. v. Seattle*..... 201

26. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS — NOTICE —WAIVER—JURISDICTION. Failure to publish the initial resolution for an assessment twice, as required by Rem. & Bal. Code, § 7705, is waived by parties appearing to protest against the assessment, where no objection was made at the time to the sufficiency of the notice; since the notice is not jurisdictional in the absolute sense that it could not be waived. *Chandler v. Puyallup*..... 632

27. SAME—ASSESSMENTS—NOTICE—APPEARANCE. Notice of a street assessment given to the owner's agent, who appeared and filed exceptions to the assessment, is sufficient to confer jurisdiction to make the assessment. *Olympia v. Turpin*..... 581

MUNICIPAL CORPORATIONS—CONTINUED.

28. SAME—STREETS—INJURY TO PEDESTRIANS—TRAPDOORS. A city is liable for injuries received by a pedestrian by reason of partially open trapdoors, maintained in a sidewalk where persons were continuously passing over them, and which were either not in good repair, or which were opened without warning or guarding the place. *Connolly v. Spokane*..... 160

29. MUNICIPAL CORPORATIONS—STREETS — USE — COLLIDING WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a pedestrian struck by an automobile while walking diagonally across a street between crossings was guilty of contributory negligence, is for the jury, where there was doubt as to whether she was paying attention to traffic. *Miller v. Spokane Bakery Co*..... 4

30. SAME—ELECTION—INDEBTEDNESS INCURRED—LIMITATIONS. An election to authorize the incurring of indebtedness by a port district is not invalidated in that the debt exceeded the statutory limit of two and one-half per cent of the assessed valuation of property within the district, where it appears that eight distinct propositions were voted on, and the aggregate indebtedness for all the propositions, exclusive of the last one, was within the limitation, and no other debt was contemplated or threatened; and the last proposition was separate from and additional to the others and contingent and expressly conditioned upon the event that, at some future time, the district should have the necessary legal authority and right to incur the indebtedness. *Paine v. Port of Seattle*..... 294

31. MUNICIPAL CORPORATIONS—INDEBTEDNESS — CONSTITUTIONAL LIMIT —SUPERIMPOSED MUNICIPALITIES. The constitutional provision that no county, town, school district, or other municipal corporation shall become indebted to an amount exceeding a certain per centum of its taxable property, fixes a separate limitation for each corporation named which is not affected by the indebtedness of the different municipalities having jurisdiction over the territory on which it is superimposed, if the legislature did not abuse its power by providing for the creation of a municipal corporation for the sole purpose of avoiding the constitutional limitation of indebtedness. *Paine v. Port of Seattle*..... 294

32. SAME. A port district covering an entire county, is a municipal corporation having an independent existence with power to incur indebtedness on its own account up to the constitutional limitation, and its creation is not an abuse of the power of the legislature in that it was created to avoid the constitutional limitation of indebtedness of the municipal corporations upon whose territory it was superimposed, where they were created for entirely different purposes, and its chief object was to provide public terminal facilities for both sea and land commerce, although the municipalities upon

MUNICIPAL CORPORATIONS—CONTINUED.

which it was superimposed had somewhat similar powers respecting the acquisition of such facilities. *Paine v. Port of Seattle*.... 294

33. MUNICIPAL CORPORATIONS—IMPROVEMENTS — PORT DISTRICTS — INDEBTEDNESS—SUBMISSION—PROCEEDINGS. The submission of the question of incurring indebtedness by a port district under Laws 1911, p. 418, § 4, is authorized after the adoption of the "comprehensive scheme" provided for in § 6, and prior to the adoption of the "detail plans" provided for in § 9. *Paine v. Port of Seattle*..... 294

34. MUNICIPAL CORPORATIONS—PROPERTY—ACQUISITION — PRIVATE PURPOSES—LEASES—LOAN OF CREDIT. The borrowing of money for the purpose of acquiring sites for docks, wharves, and other public structures is a municipal purpose as well as a public purpose, and is not a loaning of municipal credit to an individual, within the meaning of the constitution, notwithstanding they were to be leased for a limited time to private persons; and the private uses of the lessee would not affect the validity of the bonds issued to acquire or construct them, if they were not acquired or constructed for the sole purpose of leasing, and the power was reserved to regulate wharfage charges. *Paine v. Port of Seattle*..... 294

35. MUNICIPAL CORPORATIONS — INDEBTEDNESS AND BONDS — POWERS—RESTRICTIONS—STATUTES—CONSTRUCTION. Laws 1911, p. 418, § 4, empowering a port district to acquire or construct systems of sea walls, jetties, wharves, docks, ferries, canals, locks, tidal basins and other rail and water transfer and terminal facilities, and to issue local improvement bonds to pay for the same, contains a seeming inconsistency in also providing that no bonds shall ever be issued for the acquiring of any "dock or wharf" until such dock or wharf has been leased upon terms which will produce a net income sufficient to pay the bonds at maturity and the interest thereon, in view of the requirement in § 6 of the preliminary adoption of a comprehensive plan or scheme of the entire system; and such limitation as to docks and wharves can have no application, where a comprehensive scheme has been adopted, as required by § 6, in which there is no possibility of separating the earnings of the dock or wharf from the earnings of the other facilities making up the entire system; and hence it must be construed to apply only where a dock or wharf is acquired separately or together without the other facilities. *Paine v. Port of Seattle*..... 294

36. SAME—PUBLIC IMPROVEMENTS—BONDS — INTEREST—SALE AT DISCOUNT. The port district act not providing the rate of interest that the commission may authorize on bonds sold, the commission will not be enjoined from selling at a discount bonds drawing four and one-half per cent interest, the limit specified in the resolution calling the election, where it is not alleged that the discount allowed

MUNICIPAL CORPORATIONS—CONTINUED.

will make usurious interest, the general powers of the commission clearly including the power to regulate the rate of interest, and there being nothing in the resolution respecting the rate at which the bonds should be sold. *Paine v. Port of Seattle*..... 294

37. MUNICIPAL CORPORATIONS—CLAIMS—NOTICE OF INJURY—STATUTORY PROVISIONS. Where a city ordinance provided that claims for personal injuries by reason of the city's negligence must be presented within thirty days, and that if the injury was caused by the existence of snow or ice or by reason of such place being out of repair, unsafe, or obstructed, the first provision relates to continuous negligence which the city could have provided against, and the latter provision refers only to temporary and quickly changing conditions; and hence thirty days is allowed for notice of an injury by reason of trapdoors being left partially open in a place where pedestrians "usually and continuously passed to and fro and over and in so passing walked continuously over and across said doors." *Connolly v. Spokane*..... 160

MURDER:

See HOMICIDE.

NAMES:

Partnership name, filing certificate with county clerk, see PARTNERSHIP.

NAVIGABLE WATERS:

1. NAVIGABLE WATERS—RIPARIAN OWNERS—RIGHT OF APPROPRIATION—CONSTITUTIONAL PROVISIONS. In view of Const., art. 17, § 1, asserting title in the state to the beds and shores of all navigable waters, including the line of high water in navigable lakes, the riparian owner on a navigable lake has no common law right as such owner to the waters of the lake for the purposes of irrigation superior to the right of appropriation possessed by owners of land not bordering upon the lake under the laws of the state relating to the appropriation of water for irrigation; and it is immaterial that such riparian rights are based upon titles from the general government prior to the adoption of the state constitution. *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*..... 442

2. SAME—STATUTORY PROVISIONS. The reparian owner on a navigable lake is not given any right superior to others to appropriate the water thereof for the purpose of irrigation, by Rem. & Bal. Code, §§ 6325, 6326, in the act entitled an act providing for condemnation proceedings for right of way for irrigation and relating to the right of appropriation of water, which provides that any person is entitled to appropriate water for irrigation, if not otherwise appropriated, and that all owners on the banks of any stream or water

NAVIGABLE WATERS—CONTINUED.

course shall be entitled to the use of water therefrom, not otherwise appropriated, for the purposes of irrigation to the full extent of the soil for agricultural purposes. *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*..... 442

3. SAME. Rem. & Bal. Code, § 6338, providing that all persons on the "margin, brink, neighborhood or precinct" of any lake shall have the right to place upon the bank a wheel, steam pump, or other machine for the purposes of raising the water to the level required for irrigating the land, does not give a riparian owner any right to appropriation superior to the right of other owners not bordering upon the lake, other than the right of appropriation common to all. *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*..... 442

NECESSITY:

For exceptions for purpose of review, see APPEAL AND ERROR, 4, 5.
Presenting claim against county as condition precedent to suit, see COUNTIES.
For certificate and return, see DEPOSITIONS, 4.
For condemnation of property, see EMINENT DOMAIN, 2, 4, 5.
Of notice to creditors before making allowance for support of widow, see EXECUTORS AND ADMINISTRATORS, 3.
For pleading statute of frauds, see FRAUDS, STATUTE OF, 5.
Written instructions to jury, see TRIAL, 4.
Notice of appropriation, see WATERS AND WATER COURSES, 3.

NEGLIGENCE:

In maintenance of appliance in sleeping car, see CARRIERS, 5.
Carriage of passengers, see CARRIERS, 6, 8, 9.
Of passengers, see CARRIERS, 10.
Measure of damages, see DAMAGES, 4.
Of driver of automobile, see HIGHWAYS.
Of employers, see MASTER AND SERVANT.
Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 8-10.
Of city in maintaining open trapdoor in sidewalk, see MUNICIPAL CORPORATIONS, 28.
Of person injured on street, see MUNICIPAL CORPORATIONS, 29.
Of person injured by operation of street railroad, see STREET RAILROADS, 3.

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE:

Ground for new trial in civil actions, see NEW TRIAL, 3.

NEW TRIAL:

Review of rulings on, see APPEAL AND ERROR, 15, 17.
Remand for on reversal of judgment, see APPEAL AND ERROR, 42.

1. NEW TRIAL — GROUNDS — INSTRUCTIONS — REQUESTS. A new trial should not be granted for failure to give an instruction which was not specifically requested. *Grant v. Huschke*..... 174

2. NEW TRIAL—INSUFFICIENCY OF EVIDENCE — DISCRETION — ABUSE. Where a new trial was granted because the evidence was insufficient to sustain a verdict for the defendant, and the order was affirmed on appeal, upon a retrial of the same case upon substantially the same evidence, which was conflicting, it is an abuse of discretion to set aside a verdict for the plaintiff as not sustained by the evidence. *Thomas & Co. v. Hillis*..... 53

3. NEW TRIAL — CUMULATIVE EVIDENCE — DILIGENCE. A new trial should not be granted for newly discovered evidence that was merely cumulative or impeaching and no excuse was offered for not producing the witnesses at the first trial. *Stewart v. Bowen*.... 195

NEXT OF KIN:

See DESCENT AND DISTRIBUTION.

NOMINATION:

For office, see ELECTIONS, 1-4.

NONSUIT:

On trial, see TRIAL, 1.

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

Of appeal, see APPEAL AND ERROR, 7.
To attorney general of noncompliance with laws by corporation as prerequisite to suit for dissolution, see BUILDING AND LOAN ASSOCIATIONS, 4.
Of election to redeliver stock under option agreement, see CORPORATIONS, 3.
To creditors of settlement of estate, see EXECUTORS AND ADMINISTRATORS, 2, 3.
To employer of accident, see MASTER AND SERVANT, 1.
Of polling places for port district election, see MUNICIPAL CORPORATIONS, 3.
Of street assessment, see MUNICIPAL CORPORATIONS, 26, 27.
Claims for personal injuries, see MUNICIPAL CORPORATIONS, 37.
Appointment of receiver, see RECEIVERS, 1.
Appropriation of waters, see WATERS AND WATER COURSES, 3-5.

OBJECTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 6.
To depositions, see DEPOSITIONS, 2, 5.
To condemnation of property for public use, see EMINENT DOMAIN, 4, 5.
To jurisdiction of court to classify and allow claims, see EXECUTORS AND ADMINISTRATORS, 5.

OFFICERS:

See RECEIVERS.
Corporate officers, see CORPORATIONS, 6, 7.
Mandamus to state officer, see COURTS, 2.
Entitled to bring action to secure count of ballots cast, see ELECTIONS, 5.
Execution sale to officer, see JUDICIAL SALES, 1-3.
Municipal officers, see MUNICIPAL CORPORATIONS, 11.
Right to demand indemnity bond, see SHERIFFS AND CONSTABLES.

OPINIONS:

As constituting warranty of goods sold, see SALES, 1.

OPTION:

To redeliver stock purchased, see CORPORATIONS, 3, 4.

ORAL CONTRACTS:

See FRAUDS, STATUTE OF.

ORDER OF PROOF:

See EVIDENCE, 5.

ORDERS:

Review of, see APPEAL AND ERROR, 1, 7.
Of judge outside county, see JUDGES, 2.
Assumption of risk in obeying orders, see MASTER AND SERVANT, 7.

ORDINANCES:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 7.

PAIN:

As element of damages, see DAMAGES, 2.

PARENT AND CHILD:

Causing or contributing to delinquency of child, see INFANTS.

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

PAROL EVIDENCE:

In civil actions, see EVIDENCE, 6, 7.

PARTIES:

Entitled to allege error, see APPEAL AND ERROR, 1.
Right to appeal, see APPEAL AND ERROR, 2.
Rights and liabilities as to costs, see COSTS, 2; INFANTS.
Right to maintain action to restrain placing of candidate's name on ballot as nominee, see ELECTIONS, 3.
Entitled to maintain action to secure count of ballots cast, see ELECTIONS, 5.
Entitled to question eligibility of candidate for election to office, see ELECTIONS, 7.
Persons concluded by judgment, see JUDGMENT, 4, 5.
Right to allege error, see MECHANICS' LIENS, 1.
Persons who may contest will, see WILLS, 9.

PARTNERSHIP:

1. PARTNERSHIP — ASSUMED OR FIRM NAME — FILING CERTIFICATE — STATUTE—SCOPE OF ACT. A person conducting a business in which he alone is interested, in the name of a company containing his full name, is exempt from filing with the county clerk the designation of the firm with the true and real names of all persons conducting the business or having an interest therein, pursuant to Rem. & Bal. Code, § 8369, by Id., § 8372, providing that nothing in the act shall prevent the lawful use of a partnership designation if the same includes the true and real name or names of all the parties conducting such business or having an interest therein. *Merrill v. Caro Investment Co*..... 482

PASSENGERS:

Carriage of, see CARRIERS, 4-10.

PAYMENT:

By check in full as accord and satisfaction, see ACCORD AND SATISFACTION.
Of interest, see BILLS AND NOTES, 2.
Claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS.
Of taxes as indicating adverse holding of right of way, see STREET RAILROADS, 2.
Price of land sold, see VENDOR AND PURCHASER.

PERFORMANCE:

Of contract entitling broker to commissions, see BROKERS.
Part performance of contract for compromise of suit, see COMPROMISE AND SETTLEMENT, 1.
Of contract, see CONTRACTS, 5.
Part performance of oral agreement, see FRAUDS, STATUTE OF, 4.

PERMISSIVE USE:

Of lands by street railway, see STREET RAILROADS, 2.

PERSONAL INJURIES:

Abatement of action against corporation for, see ABATEMENT AND REVIVAL.
To passenger, see CARRIERS, 4-10.
Damages for, see DAMAGES, 2, 4-7.
To traveler on highway, see HIGHWAYS.
To employee, see MASTER AND SERVANT.
To person on city street or sidewalk, see MUNICIPAL CORPORATIONS, 28, 29, 37.
To person on or near street railroad track, see STREET RAILROADS, 3.

PETITION:

For local option election, see INTOXICATING LIQUORS, 3-5.
Initiative petition for amendment of city charter, see MUNICIPAL CORPORATIONS, 7, 12.
In probate proceedings, see WILLS, 8.

PHYSICIANS AND SURGEONS:

Opinions of as expert evidence, see HOMICIDE, 4.

PLANS:

Submission of to voters, for public improvement, see MUNICIPAL CORPORATIONS, 13-16.

PLEADING:

Review as dependent on objections in lower court, see APPEAL AND ERROR, 6.
Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 28.
Amendment presumed on appeal, see APPEAL AND ERROR, 16, 28.
On injunction bond, see BONDS, 2.
Amendment of complaint, see DIVORCE, 2.
Statute of frauds, see FRAUDS, STATUTE OF, 5.
Enforcement of mechanics' lien, see MECHANICS' LIENS, 2.
In action questioning validity of port district act, see MUNICIPAL CORPORATIONS, 2.

1. PLEADING—ANSWER—CONCLUSIONS—CERTAINTY. In an action to compel a town to levy a tax to meet warrants issued in payment of a lease, an answer that the lease was for the purpose of securing a water supply without the sanction or authority of the qualified voters of the town, and that the lease was therefore void, pleads a fact and not merely a conclusion, and is sufficiently definite and certain to be proof against demurrer. *State ex rel. Craig v. Newport* 286

2. PLEADING—ANSWER—DENIAL ON INFORMATION. In an action to foreclose a special street assessment lien, an answer denying any knowledge on information sufficient to form a belief as to the agency of one who was alleged in the complaint to be the defendant's agent, is evasive and is not sufficient to raise any issue thereon. *Olympia v. Turpin*..... 581

PLEADING—CONTINUED.

3. PLEADING—ADMISSIONS — ISSUES AND INSTRUCTIONS — OFFSET FOR ADMITTED NOTE. Where, in an action on an injunction bond, the complaint admitted the existence of a $3,000 note due to the defendants as an offset to the damages alleged in the sum of $13,000, and the reply to the counterclaim on the note alleged that the note had long since been paid, the pleadings, while confusing, constitute a mutual admission that there has been no actual payment of the note; hence instructions on the subject are prejudicially erroneous, where the jury were told that the burden of proving payment of the note was upon the plaintiffs, that if they found damages, they could deduct therefrom the amount due on the note, but if not satisfied that the plaintiff is entitled to recover, and that the note was not paid, they must find for the defendant for the amount due on the note; since the instructions should have been framed to allow defendant an offset or judgment for the amount due on the note, upon any verdict rendered. *Mead v. Kalberg*..... 517

4. PLEADING—DEPARTURE—GARNISHMENT. It is a departure for plaintiff in garnishment to seek recovery from the garnishee on the theory that the garnishee was indebted to the plaintiff. *Ford v. Aetna Life Ins. Co*..... 29

5. PLEADING—DEPARTURE—IMMATERIAL VARIANCE. A judgment for personal injuries should not be set aside for failure to prove the facts precisely as alleged, where the evidence sustained the substance of the issue, and there was not a substantial departure. *Hansen v. Rounds*..... 350

6. PLEADING — TRIAL — AMENDMENT — DISCRETION — ABUSE. A trial amendment to the complaint is within the discretion of the court, and will not be disturbed except for abuse of discretion, and none appears, where omissions in the complaint were not called to the attention of the trial court until after the close of plaintiff's evidence, which fully covered the defects. *Gust v. Gust*..... 595

7. PLEADINGS—AMENDMENTS TO CONFORM TO PROOF. Upon failure of proof as to the terms of a contract of employment, the complaint should be deemed amended to conform to proof of *quantum meruit* for the services performed. *Thayer v. Harbican*..... 278

8. PLEADING—AMENDMENT TO CONFORM TO PROOF—VARIANCE—MATERIALITY. In an action for trespass by the cutting of timber in which the answer pleaded payment for the timber under a written contract, it is not error to treat the answer as amended to conform to proof of payment under an oral contract, where evidence thereof was admitted without objection other than to its admission as varying the terms of the writing pleaded, and appellant had full opportunity to and did offer considerable evidence to meet it. *Stocking v. Boyer*..... 615

PLEDGES:

Of corporate stock, see CORPORATIONS, 5.

POLICY:

Of insurance, see INSURANCE.

POLLS:

Failure to keep open full time, see ELECTIONS, 6.
Designation of polling place for port district election, see MUNICIPAL CORPORATIONS, 3.

PORT DISTRICTS:

Creation of, see MUNICIPAL CORPORATIONS, 1-6.

POSSESSION:

Action of conversion by third party against sheriff in possession of property in claim and delivery suit, see REPLEVIN.

POWERS:

Of central committee to declare vacancy on political ticket, see ELECTIONS, 4.
Of port district, see MUNICIPAL CORPORATIONS, 35.
Of court to appoint receiver, see RECEIVERS, 1.

PRACTICE:

See APPEAL AND ERROR; CONTINUANCE; DAMAGES, 5, 6; DEPOSITIONS; EVIDENCE; INJUNCTION; JUDGMENT; JURY; NEW TRIAL; PLEADING; TRIAL.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 26-39.
Change of venue for, see VENUE.

PREMEDITATION:

See HOMICIDE, 1, 5.

PRESCRIPTION:

Rights acquired by street railway, see STREET RAILROADS, 2.
Acquiring rights by in waters of spring, see WATERS AND WATER COURSES, 1.

PRESENTATION:

Of questions in brief, see APPEAL AND ERROR, 12.

PRESUMPTIONS:

On appeal, see APPEAL AND ERROR, 16.
As to death or divorce, see DESCENT AND DISTRIBUTION.
As to fraud in transfer of property by husband to wife, see FRAUDULENT CONVEYANCES.
As to sufficiency of initiative petition, see MUNICIPAL CORPORATIONS, 7.
Presumptive evidence of cost of filling state tide lands, see PUBLIC LANDS, 5.

PRICE:

Inadequacy of price at illegal execution sale, see JUDICIAL SALES, 2.

PRIMARY ELECTIONS:

See ELECTIONS.

PRINCIPAL AND AGENT:

See BROKERS.
Property held in trust by agent, see TRUSTS.

1. PRINCIPAL AND AGENT—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether a person was the agent of the defendant corporation, an admission in another case that he was the agent of one of the defendant's officers is inadmissible; especially where the agency was not in issue in such case. *Moses Land Scrip and Realty Co. v. Stack-Gibbs Lumber Co.*..... 121

PRINCIPAL AND SURETY:

See BONDS.

PRIORITIES:

Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1, 3.
Of judgment liens, see JUDGMENT, 6.
Of water rights, see WATERS AND WATER COURSES, 3.

PRIVATE USE:

Condemnation for private purposes, see EMINENT DOMAIN, 1.
Lease of terminal properties to private parties by port district, see MUNICIPAL CORPORATIONS, 34.

PROBATE:

Of will, see WILLS, 1-4, 8.

PROCESS:

On appeal, see APPEAL AND ERROR, 7.
Right to indemnity bond on service of, see SHERIFFS AND CONSTABLES.

PROFITS:

Duty to account for, see ACCOUNT.

PROHIBITION:

1. PROHIBITION—TO COURTS—SCOPE—REMEDY BY APPEAL. Prohibition does not lie to prevent the trial of an action by a court to which a change of venue is taken on account of prejudice of the judge; since the court acquired jurisdiction and there is an adequate remedy by appeal. *State ex rel. Moore v. Superior Court*..... 362

PROMISE:

To pay debt of another, see FRAUDS, STATUTE OF, 1, 2.

PROMISSORY NOTES:

See BILLS AND NOTES.

PROPERTY:

Recovery by trustees upon dissolution of corporation, see CORPORATIONS, 9.
Dedication to public use, see DEDICATION.
Taking or damaging for public use, see EMINENT DOMAIN.
Separate or community nature of, see HUSBAND AND WIFE, 4, 5.
Protection of rights of property by injunction, see INJUNCTION.
Disposition of on annulment of marriage, see MARRIAGE.
Acquisition by port district for public structures, see MUNICIPAL CORPORATIONS, 34.
Conversion against sheriff in possession in claim and delivery suit, see REPLEVIN.
Held in trust, see TRUSTS.

PROPERTY TAX:

See TAXATION, 1.

PROVINCE OF COURT AND JURY:

In civil actions, see TRIAL, 2, 3.

PUBLIC DEBT:

Submission of bond issue to vote, see MUNICIPAL CORPORATIONS, 30, 33, 34.

PUBLIC IMPROVEMENTS:

By municipalities, see MUNICIPAL CORPORATIONS, 2, 13-15, 17-26, 32-35.

PUBLIC LANDS:

Stipulation as to date of definite location of railroad line, see STIPULATIONS, 2, 3.

1. PUBLIC LANDS—GRANT TO RAILROAD — RIGHT OF WAY — NATURE—RELATION. Act of Congress of July 2, 1864, granting a right of way to the Northern Pacific Railroad Company over public lands is a grant *in praesenti*, taking effect by relation as of that date, upon definite location of the line, as against settlers acquiring public lands after the grant and before the location of the line. *Northern Pac. R. Co. v. Wadekamper*..... 392

2. PUBLIC LANDS — STATE TIDE LANDS — FILLS — CONTRACTS—LIEN—ACTUAL COST OF FILL — SUBCONTRACTOR'S PROFITS. Where a contractor filling state tide lands under a contract limiting the cost to 16 cents per cubic yard, in good faith sublet the work to a dredging company at 15 cents per yard and expended 1 cent per yard in supervision and engineering, the "actual cost" to him, within Rem. & Bal. Code, § 8103, giving a lien for the actual cost of the fill, is 16 cents per cubic yard, without deducting the subcontractor's profit of 3 cents per cubic yard. *Richards v. Bussell*.... 554

PUBLIC LANDS—CONTINUED.

3. SAME—TIDE LAND FILLS — LIENS — COST OF WORK — CONTRACTS — PROFIT—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 8103, providing for liens in favor of the contractor filling in state tide lands for the actual cost of the work and fifteen per cent additional, provided that the lien shall not be operative for an amount exceeding the cost of the work, stated in the contract, the "cost of the work" includes the actual cost to the contractor and the added fifteen per cent allowed as his profit; hence in a contract limiting the "cost" of the fill to sixteen cents per cubic yard, it is proper when the work actually cost the contractor 16 cents, to allow his lien therefor and 15 per cent additional. *Richards v. Bussell*.. 554

4. PUBLIC LANDS — TIDE LANDS — FILLS — COST OF FILL IN STREETS. Where a contract for filling unplatted tide lands, under Rem. & Bal. Code, § 8103, limited the cost to 16 cents per cubic yard, and subsequently the lands were platted, the cost of the fill in streets and alleys is to be added and charged to the abutting lands. *Richards v. Bussell*..... 554

5. SAME—EVIDENCE OF COST—PRESUMPTIONS. The certificate of the commissioner of public lands, given pursuant to Rem. & Bal. Code, § 8103, requiring him to determine the actual cost of filling state tide lands under a state contract, is presumptive evidence of the cost. *Richards v. Bussell*..... 554

6. SAME—CONTRACTS FOR FILLS—LIEN—ISSUANCE OF CERTIFICATES——TIME FOR. Where two contracts for filling contiguous tide lands were entered into at the same time, with a view of excavating one general system of waterways, there being two connecting waterways, the commissioner's certificates showing the amount of the liens by reason of the completion of one of the waterways under the first contract, against certain lots covered in the second contract, but which were nearer to and deriving their benefit from the completed canal under the first contract, are not prematurely issued, although the other waterway was not completed; since the two contracts were in substance one. *Richards v. Bussell*..... 554

7. SAME—TIDE LAND FILLS—LIENS—FORECLOSURE—ATTORNEY'S FEES. Rem. & Bal. Code, § 8103, authorizing the foreclosure of liens for the cost of filling state tide lands "in the manner provided by law for the foreclosure of liens on real estate," does not authorize the allowance of any attorney's fee other than the $10 statutory costs. *Richards v. Bussell*..... 554

8. SAME—LIENS—INTEREST ON INSTALLMENTS OF INTEREST. In an action to foreclose the lien for filling state tide lands under Rem. & Bal. Code, § 8103, providing that the amount due a contractor on certificates for filling the same shall be payable in installments, with interest from the time of the issuance of the certificate, interest is properly allowed on installments of interest past due and unpaid. *Richards v. Bussell*..... 554

PUBLIC USE:

Dedication of property, see DEDICATION.
Taking property for public use, see EMINENT DOMAIN.

PUNISHMENT:

Cruel punishment, see CRIMINAL LAW.

QUALIFICATIONS:

Of electors, see ELECTIONS, 10.

QUESTION FOR JURY:

As to holder in due course, see BILLS AND NOTES, 3.
Necessity for light in passageway in sleeping car, see CARRIERS, 9.
Contributory negligence of passenger, see CARRIERS, 10.
Authority of corporate officer, see CORPORATIONS, 7.
Negligence in causing collision on highway, see HIGHWAYS.
In criminal prosecutions, see HOMICIDE, 1.
In action for injury to servant, see MASTER AND SERVANT, 14, 15.
Negligence of person struck by automobile, see MUNICIPAL CORPORATIONS, 29.
Negligence of person struck by street car, see STREET RAILROADS, 3.
In civil actions, see TRIAL, 1.

QUIETING TITLE:

Compromise of suit, see STIPULATIONS, 1.

RAILROADS:

Carriage of goods and passengers, see CARRIERS.
Appropriation of property, see EMINENT DOMAIN, 3-6.
Judicial notice of act granting right of way to, see EVIDENCE, 1.
Grants of land in aid, see PUBLIC LANDS, 1.
Stipulation as to date of definite location of line, see STIPULATIONS, 2, 3.
In city streets, see STREET RAILROADS.

1. RAILROADS—RIGHT OF WAY—ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY. Actual possession of a railroad right of way for use as a railroad and telephone line is sufficiently shown by the testimony of a construction foreman of telegraphs that the railroad and telegraph line had been located as at present since 1887, crossing the land in question, and that the telegraph line is about forty feet from the center of the main track. *Northern Pac. R. Co. v. Wadekamper* 392

2. RAILROADS — TRESPASS — INJUNCTION — TITLE AND POSSESSION OF PLAINTIFF—THREATS—EVIDENCE—SUFFICIENCY. Injunction will lie to prevent trespass and protect possession of a railroad right of way actually used and in possession of the company under a claim of title, where the adjoining owner had notified plaintiff's telegraph construction foreman to keep off his land, and just prior to the

RAILROADS—CONTINUED.

suit had told an employee of a telegraph company, licensed by the plaintiff, not to trespass on his land, and that it would not be safe for him to go there and erect wire, the defendant's objections being made to work on the plaintiff's right of way. *Northern Pac. R. Co. v. Wadekamper*..... 392

RATE:

Of interest on taxes paid upon redemption from illegal execution sale, see JUDICIAL SALES, 3.

Provision for increased interest after default in payment of principal and interest installment, see MORTGAGES, 3.

Of interest on port district bonds, see MUNICIPAL CORPORATIONS, 36.

RATIFICATION:

Of *ultra vires* contract by acceptance of benefits, see MUNICIPAL CORPORATIONS, 16.

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

Parol evidence to aid description in deed, see EVIDENCE, 7.

Disposition of on annulment of marriage, see MARRIAGE, 2.

REBUTTAL:

Evidence to impeach witness, see WITNESSES.

RECEIVERS:

Sales made under order of court, see JUDICIAL SALES, 4.

1. RECEIVERS—APPOINTMENT—PROCEEDINGS—TRIAL—POWER OF COURT. Where the appointment of a receiver was prayed for, all the issues had been submitted, and the matter taken under advisement, the court had power to appoint a receiver without notice, after announcement of findings and some delay in order to enable the parties to make an amicable adjustment, where such appointment was necessary to preserve the property in suit from total loss by reversion. *Rice v. Ahlman*..... 6

2. RECEIVERS—COMPENSATION—AMOUNT. Where the gross receipts in a receivership were $14,779, an allowance of $3,600 for receiver's and attorney's fees will not be disturbed on appeal, where the evidence was conflicting and the allowance appears to be just. *In re Spokane-Columbia River R. & Nav. Co*..... 142

RECORDS:

On appeal, see APPEAL AND ERROR, 10.

As evidence, see EVIDENCE, 3, 4.

REDEMPTION:

From illegal execution sale, see JUDICIAL SALES, 1, 3.

REFERENCE:

See ARBITRATION AND AWARD.

REGISTRATION:

Notice of opening registration polls for port district election, see MUNICIPAL CORPORATIONS, 4.

REIMBURSEMENT:

Of trustee for consideration paid in secretly obtaining title to property, see TRUSTS, 2.

REINSTATEMENT:

Of member after default, see BENEFICIAL ASSOCIATIONS.

RELEASE:

See ACCORD AND SATISFACTION.

REMAND:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 42.

REMEDY AT LAW:

Effect on jurisdiction of equity, see INJUNCTION, 1.

REMOVAL OF CAUSES:

Change of venue or place of trial, see VENUE.

RENT:

See LANDLORD AND TENANT, 6.

Recovery by mortgagor for breach of stipulations in mortgage, see MORTGAGES, 1.

REPLEVIN:

1. REPLEVIN—STATUTORY CLAIM AND DELIVERY—RIGHTS OF THIRD PERSONS — SHERIFFS — LIABILITY — TROVER AND CONVERSION. Under the claim and delivery statute, which makes ample provision for the indemnity of both parties to the action and the sheriff, but makes no provision for the security of a third party claiming ownership, and provides that where a third party makes claim by affidavit and serving a notice of his title on the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff unless indemnified, a third party may maintain an action of conversion against a sheriff in possession in a claim and delivery suit, where the sheriff refused to surrender the property upon demand and notice by affidavit as provided by the statute. *Nasser v. Gaston*..... 685

REPRESENTATION:

Of corporation by officers or agents, see CORPORATIONS, 7, 8.

Of seller as warranty, see SALES, 1.

REQUESTS:

For instructions, see NEW TRIAL, 1.

RESCISSION:

Of contract for compromise of suit, see COMPROMISE AND SETTLEMENT.
Of sale of hotel fixtures for fraud, see FRAUD, 3.
Of contract of sale, see SALES, 3.

RESERVATION:

In deed, see DEEDS.

RES IPSA LOQUITUR:

See CARRIERS, 6, 8.

RES JUDICATA:

See JUDGMENT, 4, 5.

RESOLUTION:

Fixing salaries of corporate officers, construction, see CORPORATIONS, 6.
By port district commission for issuance and sale of bonds, see MUNICIPAL CORPORATIONS, 15.

RETURN:

Of deposition to clerk of court, see DEPOSITIONS, 4.
Of election, see ELECTIONS, 5, 6.
Canvass of returns of port district election, see MUNICIPAL CORPORATIONS, 6.

REVENUE:

See TAXATION.

REVIEW:

See APPEAL AND ERROR.
Of judgment on an award, see ARBITRATION AND AWARD.
In criminal prosecution, see CRIMINAL LAW, 2.

REVOCATION:

Of compromise agreement, see STIPULATIONS, 1.

RIGHT OF WAY:

Of railroads, see RAILROADS.
Deeds or contracts for, see STREET RAILROADS, 1, 2.

RIPARIAN OWNERS:

See NAVIGABLE WATERS.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 5-7.

ROADS:

See HIGHWAYS.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 1, 3, 6, 11-15.

SALES:

See JUDICIAL SALES.
Of corporate stock, see CORPORATIONS, 2, 3, 8.
Fraud in inducing sale, see FRAUD, 3.
Requirement of statute of frauds, see FRAUDS, STATUTE OF, 3.
Of intoxicating liquors, see INTOXICATING LIQUORS, 6, 7.
Of port district bonds at discount, see MUNICIPAL CORPORATIONS, 36.
Of realty, see VENDOR AND PURCHASER.

1. SALES—REPRESENTATIONS—WARRANTY—OPINIONS. Upon the sale of an automobile that had been run 1,500 miles as a demonstrator, on account of which the price was over twenty-one per cent less than the price of a new car, representations that it was "in first class condition, as good as any new car," and that it would "go eleven miles to a gallon of gasoline on an average," are mere "seller's praise," and do not constitute a warranty. *Smith v. Bolster*..... 1

2. SALES—WARRANTY—BREACH. A valid excuse for failure to repair a machine sold, to make it conform to warranty, is not shown by the fact that the seller objected to an attempt to repair it at a time most inconvenient, and no other attempt to repair was made. *Otis Elevator Co. v. Johnson*..... 339

3. SALES—BREACH OF WARRANTY — REMEDIES OF PURCHASER — DAMAGES—RESCISSION—ELECTION. A cause of action for the rescission of the purchase of a traction engine and return of the purchase price for breach of warranty, is inconsistent with a cause of action to recover damages for loss of profits upon work undertaken by the plaintiff for other people upon representations as to the efficiency of the engine; and an election is properly required. *Blake-Rutherford Farms Co. v. Holt Mfg. Co.*..... 192

4. SALES—BREACH OF GUARANTY — DAMAGES — DEFENSES. The purchaser of a guaranteed engine and boiler cannot offset against the price losses incurred in its business while attempting to use it with a boiler capacity that was insufficient to generate sufficient steam to operate the engine to its guaranteed capacity, where the manufacturer was not responsible for the insufficient boiler capacity; nor where the same was accepted after remedying the defect by increasing the boiler capacity, and it was not shown that the losses were suffered solely by the failure of the vendor to furnish an engine complying with the guaranty within the time fixed by the contract. *Hallidie Co. v. Washington Brick, Lime & Mfg. Co.*..... 80

SENTENCE:

In criminal prosecutions, see CRIMINAL LAW.

SEPARATE ESTATE:

Of married women, see HUSBAND AND WIFE, 4.

SET-OFF AND COUNTERCLAIM:

See PLEADING, 3.
In action for price of goods sold, see SALES, 4.

SETTLEMENT:

See ACCORD AND SATISFACTION; COMPROMISE AND SETTLEMENT.

SETTLERS:

Acquiring public lands after grant to railroad, see PUBLIC LANDS, 1.

SHERIFFS AND CONSTABLES:

Execution sale by sheriff to himself, see JUDICIAL SALES, 1-3.
Right to maintain action of conversion against sheriff, see REPLEVIN.

1. SHERIFFS AND CONSTABLES—INDEMNITY BOND—RIGHT TO DEMAND—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 4003, providing that no sheriff shall be liable for damages for refusing to serve process unless an indemnity bond, "if he requires one," is first tendered, the officer has the unqualified right to demand a bond in any case requiring a levy on personal property involving the taking of actual possession, and not merely in cases where the bond "is required by law," as in Id., §§ 573 and 1888, relating to adverse claims to property levied upon. *Canfield-Caulkins Implement Co. v. Cowden*..... 587

2. SAME. Rem. & Bal. Code, § 4003, providing that "no sheriff, deputy sheriff, or coroner" shall be liable for damages for refusing to serve process unless an indemnity bond, if he requires one, is first tendered, applies to constables when their duties in connection with process are exactly the same as the duties of sheriffs; the terms "sheriff, deputy sheriff, or coroner" being used in a generic sense. *Canfield-Caulkins Implement Co. v. Cowden*..... 587

SIDEWALKS:

Injury from open trapdoor, see MUNICIPAL CORPORATIONS, 28.

SIGNALS:

Used in directing work, see MASTER AND SERVANT, 2.

SIGNATURES:

To petition for local option election, see INTOXICATING LIQUORS, 3-5.
Right to withdraw from initiative petition, see MUNICIPAL CORPORATIONS, 12.

SLEEPING CARS:

Injury to passenger on, see CARRIERS, 4-10.

SPECIFIC PERFORMANCE:

1. SPECIFIC PERFORMANCE—RELIEF—DAMAGES—DISCRETION. In an action for specific performance of a contract for the exchange of properties, in which there was a conflict in the evidence as to whether there had been a change of possession, an allowance of damages in lieu of specific performance will be sustained, where plaintiff is thereby fully compensated for his loss; since the relief is a matter resting in the sound discretion of the lower court. *Winckler v. Strickler*..... 635

SPRINGS:

Prescriptive right to, see WATERS AND WATER COURSES, 1.

STARE DECISIS:

See COURTS, 1.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 10.

STATES:

Public lands, see PUBLIC LANDS, 2-8.

STATUTES:

Statute of frauds, see FRAUDS, STATUTE OF.

Local option elections, see INTOXICATING LIQUORS, 1, 2.

Construction of local option law as to sales in dry unit, see INTOXICATING LIQUORS, 6, 7.

Of limitation, see LIMITATION OF ACTIONS.

Bonds on public improvements, see MUNICIPAL CORPORATIONS, 35.

Appropriation of waters for irrigation, see NAVIGABLE WATERS; WATERS AND WATER COURSES, 4.

Filing certificate containing designation and names of parties composing firm, see PARTNERSHIP.

Providing liens to contractor for cost of filling state tide lands, see PUBLIC LANDS, 3.

Provision for indemnity bond to sheriff on service of process, see SHERIFFS AND CONSTABLES.

Providing for written instructions to jury, see TRIAL, 4.

1. STATUTES—SUBJECTS AND TITLES—AMENDMENTS—ENUMERATION OF SECTIONS AMENDED. The title of an act to amend an act providing for the organization and government of irrigation districts and the sale of bonds arising therefrom, the same being sections..... (specifying certain sections amended) sufficiently expresses the subject of the act without such enumeration of the amended sections, which may be treated as surplusage; hence the amendment of another section not specified in the title of the amendatory act is not void as not embraced within the title of the act, as required by Const., art. 2, § 19. *Sorenson v. Kittitas Reclamation District*.. 528

STATUTES—CONTINUED.

2. STATUTES—CONSTRUCTION. The history of the passage of an act may be resorted to in determining the legislative intent in the use of the words "last general election." *State ex rel. Griffin v. Superior Court*..... 545

STAY:

Pending appeal, see APPEAL AND ERROR, 8, 9.
Of judgment, see JUDGMENT, 7.

STIPULATIONS:

To take deposition, see DEPOSITIONS.
In mortgage, see MORTGAGES, 1-3.

1. STIPULATIONS—CONSTRUCTION—COMPROMISE AND SETTLEMENT—ARBITRATION—REVOCATION. Where an action to quiet title was compromised, by the plaintiffs agreeing to convey part of the land to the defendants and to sell the defendants any part of the balance at its market value, as determined by the parties or by arbitration, the contract recognized the plaintiffs' title and authorized a decree accordingly, and was not revocable as a mere executory agreement to submit to arbitration, since only an incidental matter was to be submitted; and defendants' remedy on failure of the arbitrators to agree was by application to the courts to fix the market value of the land. *Cogswell v. Cogswell*..... 178

2. STIPULATIONS—CONSTRUCTION—PUBLIC LANDS—RAILROAD GRANT—DEFINITE LOCATION OF LINE—PROOF. A stipulation that the date of the "definite location" of the Northern Pacific Railroad Company was in 1884, implies a compliance with all the conditions precedent to a valid definite location, and dispenses with proof (1) that the company located the line, (2) gave notice to the land department, and (3) that the selection was approved. *Northern Pac. R. Co. v. Wadekamper*..... 392

3. SAME. In a stipulation relating to the Northern Pacific right of way, the use of the word, "railway" for "railroad" is immaterial, where it was stipulated that the Northern Pacific Railway Company was the successor of the Northern Pacific Railroad Company. *Northern Pac. R. Co. v. Wadekamper*..... 392

STOCK:

Corporate stock, see CORPORATIONS, 1-5, 8.
Taxation of capital stock, see TAXATION.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 1-4, 9, 10.

STORAGE:

Loss of goods stored by carrier, CARRIERS, 1-3.

STREET RAILROADS:

Estoppel to question right to grade street, see DEDICATION.

1. STREET RAILROADS—RIGHT OF WAY—DEEDS—CONSTRUCTION. Deeds or contracts for a street railroad right of way, providing for the execution of such further grant as may be necessary after the construction of the road, are merged in a subsequent right of way deed given in pursuance of the former contracts, and referring to an unrecorded plat which dedicated streets and reserved a right of way therein as given in the subsequent deed; especially where such deed leased the right to maintain the road as already constructed until the street should be graded, at which time the deed required the company to remove its tracks to the graded street. *Seattle, Renton & Southern R. Co. v. Seattle*..... 264

2. SAME—RIGHTS BY PRESCRIPTION—PERMISSIVE USE. In such case, the use of the lands on which the road was constructed was a permissive use, and the payment of taxes thereon by the railroad company does not indicate an adverse holding. *Seattle, Renton & Southern R. Co. v. Seattle*..... 264

3. STREET RAILROADS—COLLISION—PERSONS IN STREET—CONTRIBUTORY NEGLIGENCE. Whether it was contributory negligence for plaintiff, who had one arm in a sling, to lead a horse behind a buggy, along a narrow street on which street cars were operated, depends upon the character of the horse, and where the horses were gentle and not usually frightened by street cars, the question was for the jury. *Said v. Twin City Light & Traction Co*..... 585

STREETS:

See MUNICIPAL CORPORATIONS, 24, 25, 27, 29.
Dedication to public use, see DEDICATION.
Cost of tide land fills in streets, see PUBLIC LANDS, 4.

SUBSCRIPTIONS:

To corporate stock, see CORPORATIONS, 1, 2.

SUBSTITUTION:

Of contract, see CONTRACTS, 6.

SUFFERING:

As element of damages, see DAMAGES, 2.

SUPERSEDEAS:

On appeal, see APPEAL AND ERROR, 8, 9.

SUPPRESSION:

Of deposition, see DEPOSITIONS, 1, 4, 5.

TAXATION:

Municipal taxes, see MUNICIPAL CORPORATIONS, 15.

Payment of as indicating adverse holding of right of way, see STREET RAILROADS, 2.

1. TAXATION — CONSTITUTIONAL REQUIREMENT — UNIFORMITY — BANK STOCK—"PROPERTY TAX." The assessment of bank stock for the purposes of general taxation, under Rem. & Bal. Code, § 9134, requiring it to be assessed to the owners thereof at its full and fair value in money, is a property and not an excise tax, and hence is subject to the constitutional requirement that taxes be uniform and equal (overruling *Pac. Nat. Bank v. Pierce County*, 20 Wash. 675, 56 Pac. 936, and *Ridpath v. Spokane County*, 23 Wash. 436, 63 Pac. 261). *Spokane & Eastern Trust Co. v. Spokane County*..... 48

2. SAME—UNIFORMITY—ARBITRARINESS—RELIEF—EQUITY. Const., art. 7, § 2, requiring a uniform and equal rate of assessment and taxation of property, is violated by the assessment of bank stock at 60 per cent of its value, when all other personal property is intentionally, and in pursuance of a fixed and definite policy, assessed at less than forty per cent of its value; and being arbitrary and a constructive fraud upon the rights of the property holder discriminated against, equity will grant relief. *Spokane & Eastern Trust Co. v. Spokane County*..... 48

TENDER:

Of stock under option agreement to take redelivery, see CORPORATIONS, 4.

Of amount due on note and mortgage, see MORTGAGES, 5.

TESTAMENTARY CAPACITY:

See WILLS, 5.

THREATS:

Of an adjoining owner as ground for injunction against trespass on right of way, see RAILROADS, 2.

TIDE LANDS:

Filling state tide lands, see PUBLIC LANDS, 2-8.

TIME:

For taking appeal, see APPEAL AND ERROR, 7.

For exercise of option to redeliver stock purchased, see CORPORATIONS, 3.

For motion to suppress deposition, see DEPOSITIONS, 5.

To present claim for personal injuries, see MUNICIPAL CORPORATIONS, 37.

For issuance of certificate showing lien for cost in filling state tide lands, see PUBLIC LANDS, 6.

TITLE:

Statutes, see STATUTES, 1.
Fraud of agent in obtaining title to corporate property, see TRUSTS.

TORTS:

See FRAUD; FRAUDULENT CONVEYANCES.
Measure of damages, see DAMAGES, 2, 4-6.
Causing death, damages for, see DEATH.
Of employers, see MASTER AND SERVANT.

TOWNS:

Water supply, extending pipes to property line, see WATERS AND WATER COURSES, 6-8.

TRAPDOORS:

Injury from open trapdoor in sidewalk, see MUNICIPAL CORPORATIONS, 28.

TRIAL:

See NEW TRIAL.
Exceptions or objections for purpose of review, see APPEAL AND ERROR, 3-6.
Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 26-39.
Instructions in action on injunction bond, see BONDS, 3; PLEADING, 3.
Continuance of, see CONTINUANCE.
Instructions in action for price of stock sold, see CORPORATIONS, 2.
Instructions as to recovery of damages, see DAMAGES, 7.
Instructions in action for fraud in trade of land, see FRAUD, 2.
Right to trial by jury, see JURY.
Instructions in action for breach of covenant to furnish heat, see LANDLORD AND TENANT, 4, 5.
Place of trial, see VENUE.
Impeachment of witness, see WITNESSES.

1. TRIAL — NONSUIT — CREDIBILITY OF WITNESS — QUESTION FOR JURY. Where on a former appeal, on substantially the same evidence, the supreme court upheld the sufficiency of the evidence to sustain a recovery, the fact that the testimony of one witness in the second trial varied on immaterial issues from his former testimony, does not warrant a nonsuit, where the contradictions merely affected his credibility, and it was for the jury to determine the credit to be given to his testimony. *Delaski v. Northwestern Imp. Co.*..... 143

2. TRIAL—PROVINCE OF COURT AND JURY. Whether there is any evidence of a fact in issue is a question for the court. *Girocamo v. Tribble*..... 25

3. TRIAL—PROVINCE OF COURT AND JURY—CONSTRUCTION OF CONTRACT—VERDICT. Where the only dispute between parties to a written con-

TRIAL—CONTINUED.

tract for digging a well was as to who breached the contract, resulting in a discontinuance of the work, and the jury found that the defendant was in default, the court may, upon a general verdict for the plaintiff, enter judgment for the proper amount, where it was a mere matter of computation. *Buffington v. Henton*..... 44

4. TRIAL—INSTRUCTIONS—WRITTEN INSTRUCTIONS—NECESSITY—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 339, providing that the charge of the court must be reduced to writing and taken to the jury room, and § 395, providing that the same shall become a part of the record upon being filed with the clerk, it is reversible error to give orally an instruction relating to the credibility of witnesses, which could not be taken to the jury room, or made a part of the record without a statement of facts; and the statute being mandatory, it is immaterial that the instruction was without prejudicial effect. *Raynor v. Tacoma R. & Power Co*..... 133

5. TRIAL—SPECIAL INTERROGATORIES—DISCRETION. Error cannot be assigned on the refusal to submit special interrogatories to the jury, the matter being entirely discretionary. *Purcell v. Warburton*..... 129

TRESPASS:

Restraining, see INJUNCTION.

Enjoining trespass on right of way, see RAILROADS, 2.

Posting notice of appropriation as trespass, see WATERS AND WATER COURSES, 5.

TROVER AND CONVERSION:

Action of conversion against sheriff in possession, by third person, see REPLEVIN.

TRUSTS:

Liability on subscription to stock as trustees, see CORPORATIONS, 1.

Recovery of property by trustee on dissolution of corporation, see CORPORATIONS, 9.

1. TRUSTS—CONSTRUCTIVE TRUSTS—ACQUISITION OF PROPERTY FOR CORPORATION—FRAUD—FIDUCIARY RELATION OF AGENT. Where, by a mistake in the description, one forty of a lime quarry belonging to and developed by a corporation had been conveyed away in an exchange, and the grantee, acknowledging the mistake, sought to correct the same by reconveying the forty to one who was at the time under a contract with the corporation to promote its interests in the development of the quarry, such agent holds the same in trust for the corporation and could not, while occupying a fiduciary relation, secretly obtain the title and assert it adversely to the corporation. *Soderberg v. McRae*..... 235

2. TRUSTS—CONSTRUCTIVE TRUSTS—ENFORCEMENT—CONDITIONS PRECEDENT—REIMBURSEMENT OF TRUSTEE. One acting in a fiduciary capac-

TRUSTS—CONTINUED.

ity for a corporation in secretly obtaining title to property belonging to the company which it had exchanged by mistake, is entitled, on being adjudged a trustee in equity, to reimbursement for the consideration which he was compelled to pay to secure the title, especially where the consideration was paid to one entitled to demand it, and the title could not have been secured on more favorable terms. *Soderberg v. McRae*..... 235

UNDUE INFLUENCE:

Procuring making of will, see WILLS, 1-4.

UNIFORMITY:

Of taxes, see TAXATION.

VACANCY:

Power of central committee to declare, see ELECTIONS, 4.

VACATION:

See JUDGMENT, 1-3.
Of judgment on an award, see ARBITRATION AND AWARD.
Of street, see DEDICATION.

VALUE:

Of goods destroyed by fire, see CARRIERS, 3.

VARIANCE:

See PLEADING, 5, 8.

VASECTOMY:

See CRIMINAL LAW, 1.

VENDOR AND PURCHASER:

Description in deed sufficient to put *bona fide* purchasers upon inquiry, see EVIDENCE, 7.
Fraud in sale or exchange of land, see FRAUD, 1, 2, 4.
Purchasers at judicial sales, see JUDICIAL SALES.
Transfer of ownership of personal property, see SALES.
Specific performance of contract, see SPECIFIC PERFORMANCE.

1. VENDOR AND PURCHASER—CONTRACTS — CONSTRUCTION — REPAYMENT OF PURCHASE PRICE—DEATH OF PURCHASER. A provision in a land contract for the repayment, in case the purchaser dies, of all sums paid on the purchase price, provided payment of all installments have been made promptly on or before the date thereof, is intended to secure prompt payment of installments, and being distinct from the stipulation that a sixty-day default should entitle the vendor to claim forfeiture, a repayment of purchase money can be enforced only on

VENDOR AND PURCHASER—CONTINUED.

condition that all payments had been made when due, and payments made within the sixty days of grace are unavailing. *Boyle v. Narrows Land Co.* 59

2. SAME—WAIVER—ELECTION. In such case, payments by an administratrix, representing the heirs at law, constitute an election to proceed with the performance of the contract, and preclude recovery of payments made. *Boyle v. Narrows Land Co.* 59

VENUE:

1. VENUE—CHANGE OF VENUE—PREJUDICE OF JUDGE—COURTS — JURISDICTION. The act, Laws 1911, p. 617, requiring a change of venue on the filing of an affidavit of prejudice of the trial judge, is imperative, and with the transfer the court acquires full jurisdiction to determine all questions as to where the case shall be tried. *State ex rel. Moore v. Superior Court* 362

VERDICT:

Inadequate or excessive damages, see DAMAGES, 5, 6.
Excessive damages for wrongful death, see DEATH.
Excessive damages for alienation of affections, see HUSBAND AND WIFE, 3.
Setting aside, see NEW TRIAL, 2.

VICE PRINCIPALS:

See MASTER AND SERVANT, 3.

VOTERS:

See ELECTIONS, 6, 8-11.

VOTES:

See ELECTIONS, 5, 6, 8, 9, 11.

VOTING:

Submitting question of charter amendment to vote, see MUNICIPAL CORPORATIONS, 7-12.
Submission to voters of plan for public improvements, see MUNICIPAL CORPORATIONS, 13-16.

WAIVER:

See ESTOPPEL.
Breach of contract, see CONTRACTS, 6.
Of failure to tender stock under option agreement, see CORPORATIONS, 4.
Of objections to order classifying claims and directing allowance to widow, see EXECUTORS AND ADMINISTRATORS, 2.
Notice of assessment, see MUNICIPAL CORPORATIONS, 26.
Of right to recover price paid for land, see VENDOR AND PURCHASER, 2.

WARDS:

Proposed charter amendment requiring election of officers by wards, see MUNICIPAL CORPORATIONS, 11.

WAREHOUSEMEN:

See CARRIERS, 1.

WARNING:

To servant of dangers, see MASTER AND SERVANT, 13, 15.

WARRANTY:

On sale of goods, see SALES, 1-3.

WATERS AND WATER COURSES:

See NAVIGABLE WATERS.

Condemnation of property by power and water company, see EMINENT DOMAIN, 1, 2.

Submission to voters of plan for water supply, see MUNICIPAL CORPORATIONS, 13, 16.

1. WATERS AND WATER COURSES—SPRINGS—PRESCRIPTION—RIGHTS OF PUBLIC—COUNTIES—HIGHWAYS. Springs which were originally open to appropriation may become the subject of a prescriptive right acquired by the public for a watering trough in the highway through adverse use for the statutory period. *Kiser v. Douglas County*.. 242

2. WATERS—IRRIGATION—RIGHT TO APPROPRIATE. The right to appropriate land for an irrigation project depends upon the appropriator's right to the water to be used in such project. *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*..... 442

3. WATERS AND WATER COURSES—APPROPRIATION FOR IRRIGATION—NOTICE—NECESSITY. One who failed to post any notice of appropriation of water as required by statute, cannot, in the absence of any physical appropriation of the water, claim any prior appropriation thereof, as against one who had posted notice and prosecuted preliminary work. *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*..... 442

4. SAME—NOTICE—RELATION—DILIGENCE—STATUTORY PROVISIONS. Under Rem. & Bal. Code, §§ 6317-6319, requiring the appropriator of water for irrigation to post notices and commence construction work for storage within three months, and if by diversion, to commence excavation work within six months, and that on a strict compliance with the rules, the rights shall relate back to the time of posting notice, and on failure to comply therewith, the rights shall be subject to the right of a subsequent appropriator faithfully complying with the same, the rights after posting notice depend upon such reasonable diligence in prosecuting the work as to clearly show an intent not to abandon the appropriation, as by the expenditure of $10,000 in preliminary work of great magnitude, requiring an entire season;

WATERS AND WATER COURSES—CONTINUED.

and no want of diligence short of abandonment can be asserted by any one except a subsequent appropriator. *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*..... 442

5. SAME—NOTICE—VALIDITY—TRESPASS. The posting of notices of appropriation of the waters of a lake, upon the unoccupied land of another near the shore line of the lake is not such a trespass as to amount to an unlawful initiation of the appropriation. *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*..... 442

6. WATERS AND WATER COURSES — WATER COMPANIES — FRANCHISE — SERVICE TO CONSUMERS—COST OF CONNECTIONS. Under a franchise ordinance authorizing a water company to lay its pipes in streets and requiring it to furnish water to consumers at a certain fixed monthly rate, the company must deliver the water to the consumer at his property line, and must therefore defray the expense of extending the line from the main to the property line. *State ex rel. Hodgdon v. Hoquiam Water Co*..... 682

7. SAME. A provision in a franchise ordinance authorizing a water company to make special rules and regulations for the "use of water" does not empower the company to exact a charge for tapping the main and extending the service line to the lot line. *State ex rel. Hodgdon v. Hoquiam Water Co*..... 682

8. SAME—REGULATION OF WATER COMPANIES—JURISDICTION OF COURTS. The courts have jurisdiction to determine the right of a water company under its franchise to exact a charge for tapping the main and extending the service pipe to the lot line, notwithstanding the public service commission may have exclusive original jurisdiction to determine questions involving the reasonableness of rates. *State ex rel. Hodgdon v. Hoquiam Water Co*..... 682

9. WATERS AND WATER COURSES—IRRIGATION—CONTRACT FOR WATER—INDEFINITENESS—MEETING OF MINDS. A contract whereby the defendant intended to purchase from plaintiff a water right for irrigating ten acres of land is so indefinite and uncertain that it cannot be enforced, where the contract contemplated irrigation works for irrigating 2,500 acres of land, but the owners of only 500 acres signed up, agreeing to take the number of acre water rights set opposite their names, for the purpose of irrigating the 2,500 acres "pro rata," with water rights in "all essential respects" similar to a "blank form" attached, originally prepared for the owners of all the lands, the terms of the two contracts being irreconcilable, and there being no way to determine in what "essential respects" they should be read together; since there was no meeting of minds thereon. *Pasco Reclamation Co. v. Cox*..... 549

10. WATERS AND WATER COURSES — IRRIGATION — ADVERSE POSSESSION. Where a dispute arose as to the absolute right to use for irrigation the waters of a creek, and the parties agreed to divide the water

WATERS AND WATER COURSES—CONTINUED.

half and half, and acted thereon, uninterrupted use of one-half of the water under the agreement for the period of 19 years ripens into title thereto by adverse possession, even as against a prior appropriation; and it is immaterial that such adverse use was by a lower proprietor, the agreement being a distinct recognition of his claim and fixing the extent of it. *Allen v. Roseberg*..... 442

WIDOWS:

Allowance to, see EXECUTORS AND ADMINISTRATORS.

WILLS:

See DESCENT AND DISTRIBUTION.

Insanity as affecting limitation in will contest, see LIMITATION OF ACTIONS.

1. WILLS—EXECUTION—UNDUE INFLUENCE. Undue influence will operate to defeat a will, although the testatrix was mentally competent, where there was coercion, imposition, fraud, or influence impelling the testatrix to act in fear, desire for peace, or something which she was unable to restrain. *In re Tresidder's Estate*..... 15

2. WILLS—UNDUE INFLUENCE—EVIDENCE — COMPETENCY. Undue influence in the execution of a will need not be shown by direct evidence, but it is competent to show the relations of the parties, the surrounding cicumstances, habits and inclinations of the testatrix, and the fact that provision had been made for a son in four or five wills previously executed. *In re Tresidder's Estate*..... 15

3. WILLS—UNDUE INFLUENCE—BURDEN OF PROOF. While ordinarily the burden of proof is upon the contestant of a will claiming undue influence, sufficient is shown to put the executor to his proof that there was no undue influence, where it was shown that the will was in the handwriting of the sole beneficiary, that although he knew of a former will in favor of a son, he kept its repudiation secret, and that he took care to have a physician act as witness in order to preserve proof of mental capacity, in view of former wills in favor of, and an admitted attachment for, the son. *In re Tresidder's Estate*..... 15

4. SAME—EVIDENCE—SUFFICIENCY. In such a case, undue influence is sufficiently shown, where in addition to such facts, it appears that the testatrix, then on her deathbed, had, on the day before, executed a will making provision for a son, the next day executing the contested will making her husband her sole beneficiary with a clause asking that he make provision for the son "as requested" by her, that the testatrix was in a very weak condition, and had a great attachment for her son and frequently expressed an intention to leave him her property. *In re Tresidder's Estate*..... 15

5. WILLS—MENTAL CAPACITY—EVIDENCE—SUFFICIENCY. A testatrix is not shown to have sufficient capacity to execute a will ten days before she was declared insane, where prior to the execution, she

WILLS—CONTINUED.

had shown grave symptoms of the affliction, from the first she declined more or less rapidly, and ten days after the will was executed she was found unsafe to be at large, and was confined and finally died from the effects of her infirmity. *In re Siebs' Estate*..... 374

6. WILLS—LOST WILLS — ESTABLISHMENT — EVIDENCE — SUFFICIENCY. Under Rem. & Bal. Code, § 1314, providing that no lost will shall be admitted to probate unless its provisions shall be clearly and distinctly proved by at least two credible witnesses, both witnesses must testify to its provisions from their own knowledge of its contents, and not from statements made by the testator. *In re Needham's Estate*..... 229

7. WILLS—CONSTRUCTION. A clause in a will asking the sole beneficiary to " make provision for my son R. as requested by me," must be construed in the light of several former wills in favor of R. and the circumstances surrounding its execution. *In re Tresidder's Estate*..... 15

8. WILLS—PETITION FOR PROBATE—RIGHT TO WITHDRAW — ELECTION. The contestant of a will, who petitioned for the probate of a prior will, cannot, upon winning his contest, withdraw his petition for probate of the will proposed by him, nor waive a lesser share under such will to take a greater share under the statutes of descent. *In re Tresidder's Estate*..... 15

9. WILLS—CONTEST—"PERSONS INTERESTED." Where the testatrix's father, who would have inherited the estate if no will had been made, was so far insane as to be incapable of managing his own affairs until his own death, his son as his heir may maintain a contest of the will, being a "person interested" in the will, within the meaning of the statute respecting a will contest. *In re Siebs' Estate*..... 374

WITHDRAWAL:

Of signature from initiative petition, see MUNICIPAL CORPORATIONS, 12.
Of petition for probate of will, see WILLS, 8.

WITHHOLDING:

Certificate of city engineer on completion of work, see MUNICIPAL CORPORATIONS, 23.

WITNESSES:

See DEPOSITIONS.
Order of proof on cross-examination, see EVIDENCE, 5.
Opinion evidence, see HOMICIDE, 4.
Opinion of expert as to safety of method and place of work, see MASTER AND SERVANT, 11.
Credibility as question for jury, see TRIAL, 1.

WITNESSES—CONTINUED.

1. WITNESSES—IMPEACHMENT—REBUTTAL—CREDIBILITY. After accused had denied that he and his codefendants had rehearsed their testimony in detail, evidence in rebuttal to show that the statement was untrue, is admissible, within the discretion of the court, as affecting their credibility. *State v. Drummond*..... 260

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.

WRITINGS:

Requirements of statute of frauds, see FRAUDS, STATUTE OF.
Written instructions to jury, see TRIAL, 4.

WRITS:

See INJUNCTION; PROHIBITION; REPLEVIN.

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